Supreme Court, U.S.
FILED
01-1335 OCT 29 2001
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Adam Steele, et al.,

Petitioners,

v.

City of Bemidji, et al.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Adam Steele,
Petitioner pro se
P.O. Box 1535
Bemidji, MN 56619
218-759-1162

46pp

A. QUESTIONS PRESENTED FOR REVIEW

1) Where a corporation is closely-held and almost wholly owned by it's Chief Executive Officer; is without means to obtain counsel to proceed before federal courts; and where its cause of action is so closely linked to that of an individual Plaintiff, namely its CEO, properly appearing before the Court, so as to render the causes of action of these two parties Plaintiff, as a practical matter, inseverable; may said corporation, in these extraordinary circumstances, maintain its case before the federal courts by the appearance of its CEO?

2) May the causes of Petitioner Northern Herald Publications, Inc., be maintained by Petitioner Adam Steele as a shareholder's derivative action under FRCP Rule 23.1?

2) Does the doctrine of *absolute immunity* protect a prosecutor from claims under *42 USCS 1986*?

3) Does the Sherman Anti-Trust Act (15 USCS 1, et. seq.) preclude a concerted boycott action by individuals and retailers (rather than direct competitors of the affected party) designed to limit commerce by the Petitioner in the Bemidji and Park Rapids and other areas and effectively make the Petitioners' product, a newspaper known as Northern Herald, unavailable to those of the public who wish to buy it in said areas?

4) In the instance of either an intentional, or a de facto, combination restraining trade, or restraining freedom of speech or of the press, would injunctive relief be appropriate and available?

5) Is the action of the "non-government Defendants" (10-31, inclusive, Parties, post) sufficiently tied to the actions of

the "City Defendants" (1-6 inclusive, Parties, post) which actions have already been held unconstitutional, and to the "County Defendants" (7-9, inclusive, Parties, post), to render them culpable under 42 USCS Sec. 1983 and/or Sec. 1985?

6) Did a conspiracy to deny civil rights, as defined by 42 USC 1985(3), exist?

7) Does 42 USC § 1985(3) require "class-based animus" to permit action thereunder?

8) Did the actions of the County Defendants rise to the level of neglect of duty to prevent conspiracy, actionable under 42 USC 1986?

9) Are private retail newsstands, as in grocery and convenience stores, and restaruants open to the public and selling a variety of periodicals; and free newsracks in restaurants and other places open to the public, "public places" for exercise of First Amendment rights?

B. LIST OF THE PARTIES

The following is the list of parties to the orginal proceeding in the Federal District Court of the District of Minnesota, and later before the United States Court of Appeals for the Eighth Circuit, the judgements of which Courts are sought, now, to be reviewed:

Plaintiffs:

1) ADAM STEELE, an individual, and
2) NORTHERN HERALD PUBLICATIONS, INC., a Minnesota corporation.
CORPORATE DISCLOSURE: There is no parent corporation of this corporation, nor any publicly-held corporation owning 10% or more of said corporation's stock.

Defendants:

1) THE CITY OF BEMIDJI, MINNESOTA, A Municipal Corporation,
2) ALAN FELIX, individually, and as City Attorney of the City of Bemidji, Minnesota,
3) PHIL SHEALY, individually and as City Manager of the City of Bemidji, Minnesota,
4) Sergeant MICHAEL PORTER, individually, and as an officer of the Bemidji Police Department,
5) JON HUNT, individually, and as an officer of the Bemidji Police Department,
6) ROBERT TELL, individually, and as Chief of Police of the City of Bemidji, Minnesota,
7) TIM FAVER, individually, and as County Attorney, County of Beltrami, Minnesota,
8) DAVID FRANK, individually, and as Assistant County Attorney, County of Beltrami, Minnesota,
9) COUNTY OF BELTRAMI, State of Minnesota,

10) LYNETTE RUSSELL aka LYNETTE REX, an individual,
11) DEVELOPERS' DIVERSIFIED REALTY CORPORATION, an Ohio corporation dba PAUL BUNYAN MALL, Bemidji,
12) JOHANNESON'S, INC., A Minnesota Corporation,
13) RICH JOHANNESON, individually,
14) JOSEPH LUEKEN, dba LUEKEN'S FOOD STORES,
15) WILLIAM BATCHELDER, individually,
16) TERRY SMART, an individual,
17) FORUM COMMUNICATIONS COMPANY, A North Dakota Corporation,
18) OMAR FORBERG, individually,
19) STEVE MICHAELS, dba SUPERAMERICA OF PARK RAPIDS,
20) The elusive and evasive entity which is doing business as PETRO PETES'S, Park Rapids, (which, since the original filing of the Complaint, appeared and has been identified as Western International Trading Company, a corporation),
21) J & B FOODS, INC., A Minnesota Corporation,
22) RON DARGIS, dba RON'S FOODS, dba FESTIVAL FOODS,
23) COOPERATIVE SAMPO, INC., A Minnesota Corporation, dba CENEX, Park Rapids,
24) JEFF WIZNER and MRS. JEFF WIZNER, dba COUNTRYSIDE RESTAURANT, Blackduck, Minnesota,
25) JACKIE HALL, dba COUNTRYSIDE RESTAURANT, Bemidji, Minnesota,
26) JUDY BLACK, dba MAID-RITE CAFE, Bemidji, Minnesota,
27) SHARI MISTIC, dba SOUTHSIDE RESTAURANT, Bemidji, Minnesota,
28) TIM SAGA, individually,
29) SAGA OF BEMIDJI, INC., A Minnesota Corporation, dba HIGHWAY HOST RESTAURANT, Bemidji, Minnesota,
30) KITTY LEMMER, an individual,

and
31) other unnamed persons and entities.

DISINTERESTED PARTIES:

Petitioners name the following as disinterested parties in this Petition:

Defendants 1-6, inclusive, above; for reason that Petitioners' cause against these Defendants has been remanded, by the United States Court of Appeals, to the District Court for trial, and Petitioner does not seek Certiorari, herein, on that part of the Judgment of the said Appellate Court as it relates to said Defendants; and

Defendant 30, above, who is deceased and against whom Petitioners do not proceed, before this Court, in the instant case.

C. TABLE OF CONTENTS

A. Questions presented for review i
B. List of parties to the proceeding iii
D. Citations entered in the case 1
E. Statement of basis of jurisdiction 3
F. Constitutional and statutory provisions 3
G. Statement of the case 4
H. Argument
1. OVERVIEW 9
2. SPECIFIC CONTENTIONS:
a) Absolute Immunity as Concerns "County Defendants" 10
b) Non-Government Defendants 12
c) Claims of Northern Herald Publications, Inc. 14
d) Does 42 USC § 1985(3) require "class-based animus" to permit action thereunder? 16
e) Do retailers' newsstands constitute "public places" for exercise of First Amendment rights as they relate to availability of a newspaper in said places? 18
f) Malicious Interference with Business Advantage ... 20
g) Summary - Effect of 42 USC §§ 1981, 1988 20

APPENDIX

I. OPINION OF THE UNITED STATES COURT OF APPEALS ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED A1
II. CONSTITUTIONAL AND STATUTORY PROVISIONS
A. The First Amendment to the U. S. Constitution A11
B. The Fourteenth Amendment to the U. S. Constitution A11
C. Title 42, United States Code, Section 1981 ..... A11
D. Title 42, United States Code, Section 1983 ..... A12

E. Title 42, United States Code, Section 1985 (3) A12
F. Title 42, United States Code, Section 1986 ..... A13
G. Title 42, United States Code, Section 1988 ..... A14
H. Title 15, United States Code, § 1 ..... A15
I. Title 15, United States Code, § 15 (partial) A15
J. Federal Rules of Civil Procedure, Rule 23.1 ..... A16
K. Title 28, United States Code, § 1653 ..... A16
L. Title 28, United States Code, § 1654 ..... A16
III. OTHER RELEVANT MATERIAL
A. Portions of Affidavit of Adam Steele A17

TABLE OF CITED AUTHORITIES

A. Victor & Co. v. Sleininger, 255 App. Div. 673, 676, 9 N.Y.S.2d, 323, 326 (1939) 16
Amal. Food Emp. U. Loc. 590 v. Logan Valley Plaza, 88 S. Ct. 1601 (1968) 18
Black Brothers Combined, Etc. v. City of Richmond, 386 F. Supp. 147 (1974), citing the U.S. Supreme Court in Ex parte Young, (1908) 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714) 12
Bray v. Alexandria Women's Health Clinic, (1993) 113 S. Ct. 753 and citing Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948) 16
Griffin v. Breckenridge 403 U.S. at 101, 91 S. Ct., at 1798 16
Lovell v. City of Griffin, Calif. 58 S. Ct. 666, 303 U.S. 444; Const. Amends. 1, 14 10
Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (1976) 15
Marsh v. State of Alabama, 326 U.S. at 506, 66 S. Ct. at 278 19
Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948) 16
Steele v. City of Bemidji, 114 F. Supp. 2d 838 (D. Minn. 2000) 7

D. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

1) 11/19/99 - (District Court Case No. 99-CV-1862 RHK/RLE) MINUTES: (Judge James M. Rosenbaum/Anderson, Dawn) That Plaintiff's motion for a TRO is granted; Plaintiff may distribute material [not less than] five feet from the door of the [Bemidji] post office; Plaintiff may not block access to public places; bond posted in the amount of $5. [entry date 11/22/99]

2) 11/23/99 - ORDER (Judge James M. Rosenbaum / 11/23/99) that: 1. Plaintiff's motion for a temporary restraining order is granted, subject to the conditions set forth at the hearing; 2. Plaintiff is ordered to pay a security bond to the clerk of court for this district in the amount of $5.00, pursuant to Rule 65(c). [Entry date 11/26/99]

3) 12/21/99 - PRETRIAL NOTICE ORDER (Magistrate Judge Raymond L. Erickson / 12/21/99); pretrial status conference set for 10:30 am, 1/25/00, in Duluth, MN.

4) 01/26/00 - PRETRIAL ORDER (Magistrate Judge Raymond L. Erickson) final dates for: amended complaint set for 5/1/00; discovery set for 10/1/00; non-dispositive motions set for 11/1/00; dispositive motions set for 12/1/00; ready for trial set for 12/1/00.

5) 01/26/00 - ORDER (Judge Richard H. Kyle) Referring to Magistrate Judge Raymond L. Erickson motion to dismiss for a report and recommendation.

6) 02/24/00 - MINUTE ORDER (Magistrate Judge Raymond L. Erickson) Granting plaintiffs' motion for leave to amend complaint.

7) 04/05/00 - ORDER (Judge Richard H. Kyle) That all dispositive motions (filed and to be filed) are referred to Magistrate Judge Raymond L. Erickson for hearing and a report and recommendation.

8) 04/06/00 - MINUTE ORDER (Magistrate Judge Raymond L. Erickson) granting plaintiffs' motion for additional time for service of summons and the plaintiffs shall have 30 days from the date of this Order to effectuate service upon the remaining unserved defendants.

9) 08/03/00 - ORDER (Magistrate Judge Raymond L. Erickson) the Russel defendants' motion for monetary sanctions is DENIED.

10) 08/03/00 - REPORT AND RECOMMENDATION (to Judge Richard H. Kyle) (Magistrate Judge Raymond L. Erickson) 1. That Forum's motions to dismiss be granted. 2. That J&B's motion to dismiss be granted. 3. That Petro's motion to dismiss be granted. 4. That the Beltrami defendants' motion to dismiss be granted. 5. That the Russell defendants' motion to dismiss be granted. 6. That Johanneson's motion to dismiss be granted. 7. That Developers Diversified Realty Corporations's motion to dismiss be granted. 8. That the Bemidji defendants' motion to dismiss, or in the alternative, for summary judgment be granted. 9. That Superamerica's motion to dismiss be GRANTED. 10. That the Injunction, which was issued by the District Court on 11/19/99 be summarily dissolved. (In brief, that claims against all defendants be dismissed; that summary judgement be alternatively granted as concerns the "Bemidji Defendants" (defendants 1-6, inclusive, in list of Parties, ante); and that the Temporary Restraining Order of 11/19/99 be dissolved.)

11) 08/29/00 - ORDER (Judge Richard H. Kyle) overruling

objections, adopting report & recommendation, granting motions to dismiss and for summary judgment, granting Superamerica's motion to dismiss; the injunction issued by the District Court on 11/19/99 is dissolved; and the complaint is dismissed with prejudice.

12) 07/30/01 - JUDGMENT (United States Court of Appeals for the Eighth Circuit; Judges Morris Sheppard Arnold, Richard S. Arnold and Fagg) (Appellate Case No. 00-3348MN) Reversal of summary judgement previously granted for the "City defendants" (Defendants 1-6, inclusive in the list of Parties, ante) and remand to the District Court as regards claims against said "City Defendants"; judgment of District Court affirmed in all other respects.

E. BASIS FOR JURISDICTION

1) The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on July 30, 2001. No rehearing was sought by any party.

2) Jurisdiction to review, on writ of certiorari, the judgment is conferred upon the United States Supreme Court by 28 United States Code Sec. 1254 (1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS

Text of cited provisions is contained in Appendix, post.

1) The First Amendment to the United States Constitution;
2) The Fourteenth Amendment to the U. S. Constitution;
3) United States Code, Title 42, § 1981;
4) United States Code, Title 42, § 1983;
5) United States Code, Title 42, § 1985;
6) United States Code, Title 42, § 1986;
7) United States Code, Title 42, § 1988;

8) United States Code, Title 15, §§ 1, et. seq.;
9) United States Code, Title 15, § 15.
10) Federal Rules of Civil Procedure, Rule 23.1
11) United States Code, Title 28, § 1653
12) United States Code, Title 28, § 1654

G. STATEMENT OF THE CASE

*Asterisk denotes those facts (parenthesized) which were not, at time of dismissal, part of the record, but which could have been shown on discovery or at trial, had the case been allowed to proceed.

Steele and Northern Herald, Inc., filed a First Amended Complaint naming the City of Bemidji, City Attorney Alan Felix, City Manager Phil Shealy, Chief of Police Robert Tell, and Police Officers Michael Porter and Jon Hunt (the "City defendants"); the County of Beltrami, County Attorney Tim Faver, and Assistant County Attorney David Frank (the "County defendants"); and twenty-one private individuals and businesses (the "non-government defendants").

The Northern Herald is a periodical containing political reporting, other news, and advertising. Petitioners publish the Northern Herald and have three primary means of distribution: for-profit sales through existing retailers, complimentary distribution, and direct curbside sales on public streets and sidewalks.

In early January 1998, only days following an article appearing in the Northern Herald critical of one Richard Morton, then recently deceased, Petitioner Steele was contacted by Defendant William Batchelder (Morton's nephew) and told of a combination of several persons, who were not then identified, who were acting in groups to suppress distribution of the Northern Herald. (Steele told Batchelder that he intended to pull the current issue of Northern Herald from the shelves where it was sold or

distributed, republish it without the offending article, and publish a retraction of the offending article. These things were done.*) Nonetheless, within days after the said conversation with Batchelder, all of the retailers who had theretofore sold the Northern Herald in Bemidji terminated their agreement to do so and refused to carry the paper; many establishments which had allowed complimentary copies on their premises also now refused same. Some of said retailers claimed to have been pressured by unidentified persons and threatened with group boycott. This left Northern Herald, effectively, without mode of distribution in Bemidji, excepting for the few complimentary locations that remained, and curbside sales.

(*Because the complimentary stacks are not inventoried, nor secured by the establishment having them, unlike the stacks at sale locations, and despite the wording, "1 per person," appearing on said copies, the complimentary copies are prone to theft of the entire stacks of them by persons seeking to keep the paper from public circulation. For this reason, complimentary distribution, alone, is inadequate to practically enable people wanting the paper to obtain it. Also, with complimentary stacks, as the copies are free, the demand is high but the supply of copies which can be so provided is limited by economics. Unlike the sale locations, which, being paid, can be restocked to meet whatever demand presents itself, the limited number of complimentary copies deplete quickly. Again, this makes the complimentary distribution method, if used alone, inadequate to ensure that most people who would want to obtain a paper can do so.)

(*In the theft of stacks of complimentary copies, it is rare to be able to identify a perpetrator), nonetheless, this was done in summer, 1998 by an eyewitness. After Steele notified City police of the theft, by Defendant Lynette Russell, of a stack of complimentary Northern Herald newspapers from a local business, the police merely referred the matter to the

County Attorney's Office, which refused to prosecute the theft. Although this matter was not generally publicized, within days, Respondent Batchelder evidenced awareness of same (Affidavit of Adam Steele of June 2000, in the District Court file and excerpted in the appendix hereto).

In February 1998, Steele was distributing papers near a mall, when a police officer ordered him to stop doing so. Steele discussed the matter with the City Manager, who (after a discussion with the Chief of Police) confirmed that Steele could not sell the Northern Herald at that location. By summer, 1998, after Steele complained to the City, he received a letter from City Attorney Felix stating that Steele's use of public property to "advertise and sell [his] alleged publication" without a solicitation permit and an obstruction permit violated, respectively, City Code sections 6.39 and 10.31. Felix explained that a section 10.31 permit was conditioned upon the provision of adequate insurance and bond, and that in light of Steele's recent bankruptcy, the City was concerned with his ability to provide adequate financial security. Felix warned Steele that the City would require "at a minimum public liability coverage with policy limits equal to those required of the City," and that given Steele's "past history of non-payment, a substantial bond [would be] mandatory." Finally, Felix pointed out that a violation of either ordinance was a misdemeanor and suggested that Steele, find "willing local, private outlets" to distribute his paper, commenting that "in light of this community's apparent unwillingness to embrace your ideas, another option may be your consideration of relocation to another community ... more willing to embrace your way of thinking."

Several days after receiving Felix's letter, Steele was standing by the sidewalk in front of the Bemidji Post Office—giving away copies of the Northern Herald, and wearing a sign that said "FREE – TODAY ONLY"—when a City police officer threatened to arrest him for "soliciting." Steele

responded that he was giving, not selling, the paper; the officer said he would discuss the matter with Felix and then take Steele "to jail, today" if appropriate. Steele stopped distributing the paper and called Felix, who concurred with the police officer because distributing the paper from the sidewalk violated the City's "obstruction" ordinance (even though Steele had been holding all of the copies, and had not deposited them on public property). City officials continued to threaten to arrest Steele if he distributed the paper on public property in the City without first obtaining the requisite solicitation and obstruction permits.

Petitioners' First Amended Complaint further alleges that business owners had denied service to Steele at restaurants and bars, a landlord had threatened a tenant (a friend of Steele's) with eviction if the tenant continued her relationship with Steele, and that the only commercial printing press in the Bemidji area (Forum Communications and Omar Forberg, Defendants 17 & 18 in Parties, ante) , which holds itself out to do commercial web (newspaper) printing, following a conversation with Ratchelder (See Affidavit of Adam Steele of June 2000, in the District Court file and appendix hereto), refused to print the Northern Herald.

Upon defendants' motions to dismiss or for summary judgment, the District Court held that (1) Steele (a non-lawyer) could not represent the Northern Herald in these proceedings; (2) Steele failed to state a claim against the non-government and County defendants; and (3) City defendants were entitled to summary judgment because the City ordinances were constitutional, and because the individual City defendants were entitled to qualified immunity. The temporary restraining order, issued 11/19/99, and allowing Steele to distribute Northern Herald on the public sidewalk in front of the post office at Bemidji, was dissolved by the District Court. See Steele v. City of Bemidji, 114 F. Supp. 2d 838 (D. Minn. 2000).

An appeal followed, in which the United States Court of Appeals for the Eighth Circuit reviewed de novo both the District Court's grant of the motions to dismiss and its grant of summary judgment.

On July 30th, 2001, said Court of Appeals, by the Honorable Richard S. Arnold, Circuit Judge, issued its opinion and judgment reversing the District Court's grant of summary judgement as to Steele's First Amendment claims against the "City Defendants" (1-6, inclusive, in Parties, ante) remanding said cause back to the District Court, and in all other respects, affirming the judgment of the District Court.

The Appellate Court agreed in the dismissal of all claims which might have been maintained by Petitioner, Northern Herald Publications, Inc. because said Petitioner was not represented by counsel, and held that Petitioner Adam Steele "does not have standing to raise any possible claims by the Northern Herald in this regard."

2. The basis for jurisdiction of the Court having original jurisdiction (i.e. the United States District Court for the District of Minnesota) in this matter is United States Code, Title 28, Section 1331. Venue was proper under United States Code, Title 28, Section 1391 (b) & (c).

H. ARGUMENT

1. OVERVIEW. This Writ of Certiorari should be allowed under Supreme Court Rule 10, as it involves an important question of federal law that has not been, but should be, settled by this Court.

Essentially, it involves whether a group of retailers, aided by a municipality and its law enforcement officers, and by a county prosecutor, by the collateral actions of same, has the right to discriminate against a publication, creating, with the aid of said collateral actions, a de facto citywide ban on said publication keeping same from the citizens of said municipality and in so doing, not only infringing the right of said publication to circulate, but also, and very importantly, the right of the interested citizens to obtain the publication.

In this, the retailers (defendants) have asserted their private property rights, which the Plaintiffs acknowledge and, generally, strongly support. Plaintiffs, however, assert that, historically and in many other cases, it has been found that situations can arise where certain rights of various parties can be in conflict and the Court has historically sought to find a balance. By way of example, a restaurateurs' property rights do not extend to allow him to exclude people of color from his establishment, or provide them a differing standard of service. That would conflict with other law. Similarly, the exclusion, by a number of merchants in a certain locality, of the sale of a certain publication from their establishments, whether in an intentional conspiracy or simply what amounts to, due to the number of merchants so acting (in this case, all of them), a de facto restraint of that publication in the said locality conflicts with one of our nation's oldest laws, i.e. the First Amendment to the United States Constitution, as it has been wisely interpreted by the federal Courts.

In such a situation, even if damages could not be shown,

injunctive relief (also prayed for in the First Amended Complaint) would be necessary to restore the availability of the press, which was the intent of said Amendment and necessary under same.

". . . liberty of circulating is as essential to that freedom [of the press] as liberty of publishing." Lovell v. City of Griffin, Calif. 58 S. Ct. 666, 303 U.S. 444; Const. Amends. 1, 14

For these reasons, if no other, the District Court erred in granting dismissal for the various defendants.

2. SPECIFIC CONTENTIONS.

a) Absolute Immunity as Concerns "County Defendants."

In regard to the question of law concerning absolute immunity of prosecutors, with relation, specifically, to 42 USCS 1986, Petitioner is not aware that this Court has ever approached that question, and asks that the Court consider it now.

In this, Petitioner acknowledges that the doctrine of absolute immunity for prosecutors, particularly as regards failure to prosecute, is well settled, as regards most statutory provisions regarding liability. Petitioner contends that in the case of a statute such as Sec. 1986, however, which specifically addresses neglect of duty to prevent conspiracy to deny civil rights, to apply absolute immunity here in favor of those directly charged with the primary duties of law enforcement, i.e. police and prosecutors, would, to a large extent, "gut" the statute. It would enable said officers to perpetuate a conspiracy by non-prosecution and failure to make arrests. Petitioner contends that the District Court erred in that its dismissal for the "County Defendants" (7-9, inclusive in Parties, ante) came too soon. While the Appellate Court held that failure to prosecute in a single instance of theft of a nominal stack of newspapers does not meet the muster to establish cause of action, discovery and trial might have shown 1) that, in the Beltrami County jurisdiction, it is not uncommon for theft of as little as a pack of fishhooks,

worth less than two dollars, to be prosecuted; so the failure to prosecute for the theft of copies was unusual for the jurisdiction and denied Petitioners equal protection under the laws, 2) that there have been several other incidents where Bemidji city, and Beltrami County prosecutors have failed to prosecute for crimes committed against, or reported by, the Petitioners; further, that the Petitioner Adam Steele, when, although infrequently, accused of a petty crime, has been, by same prosecutors, prosecuted vigilantly with harsh penalties sought (that, in the instant case, Petitioner Adam Steele was threatened with being immediately *taken to jail* for alleged violation of two relatively minor city ordinances is case in point); and that all of these actions and omissions, taken together, establish a pattern, and 3) that in the context of collateral actions, occurring within the same time period, by the "City Defendants" (1-6, inclusive, Parties, ante) which have been recognized by the Appellate Court as unconstitutional and devised to be a prior restraint on the Petitioners' First Amendment rights, and the collateral actions of the other defendants herein, the failure of the "County Defendants" to prosecute denied Petitioners equal protection under the laws, and furthered a conspiracy, by several parties, to deny First Amendment rights by, effectively, allowing, and letting it be known within the community that there would be practical impunity for the theft of stacks of copies of the subject newspaper; thusly defeating this lawful mode of distribution of same.

Further authority regarding absolute immunity, and further discussion of why a narrow exception to same should be carved out here may be found in the *PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS COUNTY OF BELTRAMI, FAVER & FRANK'S MOTION TO DISMISS* of April 21, 2000, filed with the District Court. To avoid redundancy, and in compliance with the conciseness requirement of Rule 14, this voluminous document is not replicated here.

Petitioner reiterates that even if absolute immunity was held to preclude recovery of damages, cause for injunctive relief as prayed for in the First Amended Complaint (paragraph 2. of the prayer, p. 22 of the First Amended Complaint) would remain (See Black Brothers Combined, Etc. v. City of Richmond, 386 F. Supp. 147 (1974), citing the U.S. Supreme Court in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)); thus the granting of total dismissal against the County Defendants on that basis was in error.

b) Non-Government Defendants.

That the actions were within a combination known to the Parties is corroborated by the statements to Petitioner Adam Steele, by Respondent William Batchelder, early in the conspiracy, wherein Batchelder reported to Steele that many groups of persons were acting in many ways to defeat the business of the Northern Herald in Bemidji, and further by his knowledge of the matter of the thefts of stacks of copies, which, in the end, would not be prosecuted. (Para. V.-VII., inclusive, of *Affidavit of Adam Steele Accompanying Combined Memorandum in Opposition to Motions to Dismiss*, of June, 2000, in the District Court file, and in the Appendix hereto.)

Had the motions to dismiss not been granted by the District Court, discovery might have also shown that attorney Carl Drahos, attorney for many of the Respondents herein before the District and Appellate Court, was, in early 1998, one of the first signers of petitions encouraging the pressure boycott, among retailers, of the Northern Herald, which encouragement involved threats against those merchants if they continued to carry the newspaper.

Again Petitioners assert that this case is worthy of the Court's consideration as it deals with an important matter of public policy in that, in the instance of the circumstances that have, in the instant case, come to pass, it has been demonstrated that it is possible, in a small and closely-knit

community, for a group of influential individuals, with the acquiescence of City and County officials, to actually stop the distribution of a periodical in that community, notwithstanding whether or not others in that community would like to receive it, and notwithstanding the rights of those others, nor those of the writers and producers of, nor advertisers in, said periodical.

This concerted action constitutes a prior restraint of protected free speech. The actions of individual "non-government" defendants (10-31, inclusive, Parties, ante), however, would not have been nearly as effective without the assistance of the County and the City. It would have been futile to try to stop the circulation of the subject newspaper in Bemidji if the curbside vendors were left in place, i.e. if they had not been threatened by the City with arrest; similarly, the unlawful purpose could not have been achieved if the free distribution stacks continued, i.e. if it had not become known that they might be stolen with impunity. For these reasons, the actions of the individual defendants involved must be viewed as closely enough in combination with official actions and omissions, to render the individual defendants civilly culpable as "state actors" and liable under 42 USCS 1983 and 1985.

The actions, in combination, of the Defendants, Petitioner has maintained, also constitute a violation of the Sherman Anti-Trust Act (15 USCS Sec. 1) for which damages are recoverable under 15 USCS Sec. 15. There are many authorities rendering group boycotts illegal per se under said act. Again, even if intentional combination could not be shown at trial (which Petitioner does not concede), and even if damages were not recoverable, still, there would remain a cause of action for injunctive relief as prayed in the First Amended Complaint, to stop a de facto combination in restraint of trade, as well as restraining the freedom of speech and of the press in Bemidji, Park Rapids, and other areas cited in the documents filed before

the District Court. For this reason, if no other, the total dismissal of these claims, by the District Court, was in error.

Further authority regarding, and discussion of the points substantiating these arguments are contained in the *COMBINED MEMORANDUM OF PLAINTIFF IN OPPOSITION TO MOTIONS TO DISMISS* of June 19, 2000 and the affidavits and exhibits accompanying same, filed with the District Court. To avoid redundancy, and in compliance with the conciseness requirement of Rule 14, these voluminous documents are not replicated here.

c) Claims of Northern Herald Publications, Inc.

The claims of Petitioner, Northern Herald Publications, Inc. ("Northern Herald"), have been dismissed by the District and Appellate Courts because it did not have counsel in the earlier proceedings, nor does it at this time. The First Amended Complaint alleges, "... ADAM STEELE is the Chief Executive Officer and major stockholder of Plaintiff Northern Herald Publications, Inc." The affidavits filed, and oral argument presented, before the District Court tended to show that Steele had made serious and diligent efforts to obtain counsel for said corporation, but was unable to procure same due to inability of said corporation to pay a retainer, and not being able to find counsel willing to take the complex case on contingency fee basis. This is so, notwithstanding the statement, on p. 9 of the District Court's (Magistrate Erickson's) Report, that "Steele has failed to retain legal counsel, on Northern Herald's behalf, not because of any financial hardship ..."

It is well established that a person may represent his own interests before the Court, as well as his interests in a derivative shareholder action where the corporation cannot represent itself.

i) The facts of this case, as they were presented to the District Court, were such as to indicate that . . the causes pled, on behalf of Northern Herald, could have taken the form of a *shareholder's derivative* action. Although it is now

known that the pleadings in the First Amended Complaint, are deficient as regards shareholder's derivative action under FRCP 23.1; all of the necessary conditions to plead per said Rule, in fact, exist; and said Complaint could be amended to contain allegations of same, pursuant to 28 USC § 1653 (which allows pleadings to be amended, for defective allegations of jurisdiction, in the trial or appellate courts) or other applicable authority permitting same. The Appellate Court was accurate in finding that Petitioner Steele did not seek leave to amend in this regard, as he was unaware that same would be necessary; Petitioners seek such leave now, as a part of any final order that this Court may deem just.

ii) Alternatively, in the instant case, the interests, rights and profits of Northern Herald are so closely tied to those of Steele, from both a First Amendment (as Steele's writing appears primarily in the Northern Herald newspaper), as well as a financial, perspective, that in order to show the damages which accrued to him, Steele would have to demonstrate the damages that accrued to Northern Herald. In this regard, justice would dictate that Steele be allowed, if not actually to represent Northern Herald for its benefit, then to present the case for damages accruing to Northern Herald, to be utilized, in the instant case, for ultimately determining the total damages to Steele as a result of the Defendants' acts and omissions which firstly damaged Northern Herald. Put briefly, to dismiss a cause on the theory that it only affects Northern Herald would be in error because any action damaging Northern Herald also directly damages Steele.

iii) In the Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (1976), a federal court said, validly, "A person's day in court is, however, more important than the convenience of the judges. ...To require this corporation to appear by a lawyer is effectively to exclude it and its sole shareholder from the courts. Were counsel freely available to lower and middle income persons in civil cases, the traditional rule requiring corporations, whether large or

small, to appear by a lawyer would work no hardship. ... [quoting A. Victor & Co. v. Sleininger, 255 App. Div. 673, 676, 9 N.Y.S.2d, 323, 326 (1939)] In our opinion, an argument on the other side far outweighs those mentioned above. It appears when we ask ourselves this question: Suppose a corporation were too impoverished to employ a lawyer to defend it, or suppose it had a large claim it believed to be just but could find no lawyer to take the case, believing it to be hopeless, should the corporation be denied its day in Court? ... " Petitioners submit that the instant case, as it deals with important civil rights and public policy issues, asks these questions.

d) Does 42 USC § 1985(3) require "class-based animus" to permit action thereunder?

A long-standing first rule of statutory construction is that a statute means what its words say. Nothing in § 1985(3) requires class-based animus. The statutes says, "If two or more persons . . . conspire . . .for the purpose of depriving . . . any *person* or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . the party so injured or deprived may have an action for the recovery of damages . . . ." [emphasis added.]

Petitioners note that the language of the statute, as regards the existence of a class aggrieved, is permissive, not mandatory.

Petitioners assert the words of the Honorable Justices O'Connor and Blackmun in Bray v. Alexandria Women's Health Clinic, (1993) 113 S. Ct. 753, at 803, wherein said Justices wrote, in dissent, "The distinction in choice of words ['deprive' rather than 'deny'] is significant in light of the interrelated objectives of the two provisions. The Fourteenth Amendment protects against state action, but it 'erects no shield against merely private conduct, however discriminatory or wrongful.' Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948). Section 1985(3), by contrast, was 'meant to reach private action.' Griffin ... [v.

Breckenridge] 403 U.S. at 101, 91 S. Ct., at 1798. Given that difference in focus, I would not interpret 'discriminatory animus' under the statute to establish the same high threshold that must be met before this Court will find that a State has engaged in invidious discrimination in violation of the Constitution."

In ways, certain elements of the instant case bear a resemblance to Bray, in that there clearly exists, in both cases, invidious animus. In both cases, a deciding point turned on the question of whether it was class-based, notwithstanding that the statute doesn't require that to be actionable. In the instant case, the animus was simply to stop the circulation of a newspaper; in Bray, it dealt with the right of accessibility to abortion. In both cases, the entities seeking redress of infringement of constitutional rights were defined by their lawful - although to some, unpopular - actions under the Constitution, rather than by color, ethnicity, or other physical characteristic.

In this instance, the Constitutional freedom sought to be protected is very important; it involves the cornerstone of American liberty - the freedoms guaranteed by the First Amendment - which when usurped, would not give rise to an identifiable class, as heretofore defined by the Courts, but which, nonetheless, are worthy of protection. Again, Petitioners, cite the Honorable Justices O'Connor and Blackmun, in Bray, supra, 113 S. Ct. at 804, writing, "Private actors acting in groups can be as devastating to the exercise of civil rights as hostile state actors, and they pose an even greater danger because they operate in an unregulated realm divorced from the responsibilities and checking functions of government."

Petitioners now ask this Court to consider whether it's previously settled, in certain cases, requirement of class-based animus, if applied in all cases and in all ways, serves the intended purpose of § 1985(3); and also whether the extensions of law contemplated by the wording of § 1988

(a) which, in order to work the spirit of civil rights statutes, says: "in all cases where they [the laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law ... shall be extended to and govern the said courts . . . ." might justify a departure from the standard used in previous cases dealing with other, and different types, of civil rights where a class-based animus might be more readily discernible.

e) Do retailers' newsstands constitute "public places" for exercise of First Amendment rights as they relate to availability of a newspaper in said places?

There is no question as to the importance of private property rights. Still, for the public benefit, those rights have historically had to be balanced with public policy objectives. An establishment open to the public may not discriminate in the classes of people it serves in violation of federal law; similarly there are many other areas where a balancing of rights has been necessary, e.g. a business owner may be required to devote a certain amount of parking for handicapped individuals, in certain localities he may be restricted from displaying tobacco and smoking articles in certain manners, and those who sell alcohol are restricted, usually by state laws, in the most stringent ways as to where, when and in what manner the product may be sold, and how the premises may be conducted. Clearly, a minimally-intrusive governmental presence to achieve a desired public purposes and protect public interests and rights, in private business, is nothing novel.

Nor is it new for the Court to recognize the occasional need for the protection of First Amendment civil rights on private property. In Amal. Food Emp. U. Loc. 590 v. Logan Valley Plaza, 88 S. Ct. 1601, (1968), the Court held that where the private property assumes to some significant degree the functional attributes of public property devoted to public use, then the property owner might become subject to the commands of the First Amendment; that [at 1612, citing

Marsh v. State of Alabama, 326 U.S. at 506, 66 S. Ct. at 278] "Ownership does not always mean absolute dominion, and the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it." In this, the Honorable Justice Douglas concurred, his comments indicating that he saw the injustice, "... to make 'private property' a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse. ..."

Whereas, in Logan, (88 S. Ct. at 1609) the functional attributes were that "the shopping center serves as the community business block [citing Marsh, supra, 326 U.S. at 508, 66 S. Ct. at 279] 'and is freely accessible and open to the people in the area and those passing through, ...'"; similarly, here, the retail establishments owned by the Defendants are also accessible and open to the public. Due to the size and diversity of merchandise now sold by the Defendants who are grocers, and the nature of the Defendant who operates a shopping mall, their stores and establishments have assumed the functional attributes of a town square, community business block or similar public place where newspapers might be publicly sold; the newsstands (i.e. in the Defendants' grocery stores and restaurants) have, to a large degree, replaced the news vendors who might have operated in the aforementioned public places. In this way also, said privately owned newsstands, in Defendants' stores and restaurants, being places where First Amendment rights are routinely expressed, have particularly assumed functional attributes of a public place.

Of note is that the subject matter of Logan was the presence of pickets in a privately owned shopping center - something far more intrusive into the private property than in the instant case where we are concerned merely with the leaving of newspapers for sale in those areas of stores and restaurants (owned by the Defendants) which are devoted to the display,

availability and sale of newspapers.

In recent times, there have been cases, notably involving other First Amendment conduct in shopping malls and the like, where *certain* conduct has been constrained or prohibited; these decisions do not run contrary to, but rather well in accord with Logan, supra, (88 S. Ct. at 1609) which said, "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it."

That circumstance, however, does not appear in the instant case, which involves putting a newspaper on publicly open newsracks; a circumstance more in line with the holding, again in Logan (88 S. Ct. at 1609) that "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises and for a purpose generally *consonant with the use to which the property is actually put.*" [emphasis added.]

f) Malicious Interference with Business Advantage.

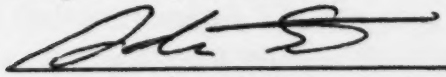
Petitioners contend that the actions of the Defendants herein constitute Malicious Interference with Business Advantage (a civil tort in Minnesota) as set forth in paragraph LXI. of the First Amended Complaint.

g) Summary - Effect of 42 USC §§ 1981, 1988

Petitioners maintain that 42 USC § 1981(c) protects against impairment of civil rights, including that specifically by nongovernmental discrimination. 42 USC § 1988(a) provides for necessary extension of law at equity to achieve said protection, even where the object is not reached by statute. It would seem that where First and Fourteenth Amendment rights and liberties have been compromised to the degree, as regards Petitioners, in Bemidji, Park Rapids and the other stated areas, as alleged and as shown by the record, equitable relief would, under these statutes, lie to compensate for the damages done, and to prevent continuation of same. For

this reason, also, the District Court erred in dismissing said allegations.

Dated: October 28th, 2001
Respectfully Submitted,



Adam Steele, Petitioner, pro se and on behalf of
Northern Herald Publications, Inc., as CEO thereof

APPENDIX

I. OPINION OF THE UNITED STATES COURT OF APPEALS ENTERED IN CONJUNCTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED:

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3348MN

On Appeal from the United States District Court
for the District of Minnesota.

Adam Steele,

Appellant,

Northern Herald Publications, Inc., a Minnesota corporation,

Plaintiff,

v.

City of Bemidji, a municipal corporation; Alan Felix, individually and as City Attorney for the City of Bemidji, Minnesota; Phil Shealy, individually and as City Manager of the City of Bemidji, Minnesota; Michael Porter, individually and as an officer of the Bemidji Police Department; Jon Hunt, individually and as an officer of the Bemidji Police Department; Robert Tell, individually and as Chief of Police of the City of Bemidji, Minnesota; Tim Faver, individually and as County Attorney, County of Beltrami, Minnesota; David Frank, individually and as Assistant County Attorney, County of Beltrami, Minnesota; Lynette Russell, also known as Lynette Rex, an individual; Rich Johanneson, individually; Joseph Leuken, doing business as Leuken's Food Stores; William Batchelder,

individually; Terry Smart, individually; Forem Communications Company, a North Dakota corporation; Omar Forberg, individually; Petro Pete's, the elusive and evasive entity which is doing business as Petro Pete's Park Rapids; Kitty Lemer, individually; County of Beltrami, State of Minnesota; Developers' Diversified Realty Corporation, doing business as Paul Bunyan Mall, Bemidji, an Ohio corporation; Johanneson's, Inc., a Minnesota corporation; Steve Michaels, doing business as Superamerica of Park Rapids; J & B Foods, Inc., a Minnesota corporation; Ron Dargis, doing business as Ron's Foods, doing business as Festival Foods; Cooperative Sampo, doing business as Cenex, Park Rapids, Inc., a Minnesota corporation; Jeff Wizner; Mrs. Jeff Wizner, doing business as Countryside Restaurant, Blackduck, Minnesota; Jackie Hall, doing business as Countryside Restaurant of Bemidji, Minnesota; Judy Black, doing business as Maid-Rite Cafe Bemidji, Minnesota; Shari Mistic, doing business as Southside Restaurant, Bemidji, Minnesota; Tim Saga, individually; Saga of Bemidji, doing business as Highway Host Restaurant, Bemidji, Minnesota, Inc., a Minnesota corporation,

Appellees.

Submitted: May 1, 2001
Filed: July 30, 2001

Before MORRIS SHEPPARD ARNOLD, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

Adam Steele appeals the District Court's adverse grant of summary judgment as to some claims, and the dismissal of other claims, in this suit brought under 42 U.S.C. §§ 1983, 1985, and 1986; the Sherman Antitrust Act; and state law.

We affirm in part and reverse in part.

Steele and Northern Herald, Inc., filed an amended complaint naming the City of Bemidji, City Attorney Alan Felix, City Manager Phil Shealy, Chief of Police Robert Tell, and Police Officers Michael Porter and Jon Hunt (the "City defendants"); the County of Beltrami, County Attorney Tim Favor, and Assistant County Attorney David Frank (the "County defendants"); and twenty-one private individuals and businesses (the "non-government defendants"). Viewed in the light most favorable to plaintiffs, the record establishes the following.

The Northern Herald is a periodical containing political reporting, other news, and advertising. Plaintiffs publish the Northern Herald and have three means of distribution: for-profit sales through existing retailers, complimentary distribution, and direct curbside sales on public streets and sidewalks. In February 1998, Steele was distributing papers near a mall, when a police officer ordered him to stop doing so. Steele discussed the matter with the City Manager, who (after a discussion with the Chief of Police) confirmed that Steele could not sell the Northern Herald at that location. After Steele complained to the City, he received a letter from City Attorney Felix stating that Steele's use of public property to "advertise and sell [his] alleged publication" without a solicitation permit and an obstruction permit violated, respectively, City Code sections 6.39 and 10.31. Felix explained that a section 10.31 permit was conditioned upon the provision of adequate insurance and bond, and that in light of Steele's recent bankruptcy, the City was concerned with his ability to provide adequate financial security. Felix warned Steele that the City would require "at a minimum public liability coverage with policy limits equal to those required of the City," and that given Steele's "past history of non-payment, a substantial bond [would be] mandatory." Finally, Felix pointed out that a violation of either ordinance was a misdemeanor and suggested that Steele, find "willing local, private outlets"

to distribute his paper, commenting that "in light of this community's apparent unwillingness to embrace your ideas, another option may be your consideration of relocation to another community ... more willing to embrace your way of thinking."

Several days after receiving Felix's letter, Steele was standing by the sidewalk in front of the Bemidji Post Office—giving away copies of the Northern Herald, and wearing a sign that said "FREE – TODAY ONLY"—when a City police officer threatened to arrest him for "soliciting." Steele responded that he was giving, not selling, the paper; the officer said he would discuss the matter with Felix and then take Steele "to jail, today" if appropriate. Steele stopped distributing the paper and called Felix, who concurred with the police officer because distributing the paper from the sidewalk violated the City's "obstruction" ordinance (even though Steele had been holding all of the copies, and had not deposited them on public property). City officials continued to threaten to arrest Steele if he distributed the paper on public property in the City without first obtaining the requisite solicitation and obstruction permits.

Plaintiffs asserted further in their complaint that, after Steele notified City police of the theft of a stack of complimentary Northern Herald newspapers from a local business, the police merely referred the matter to the County Attorney's Office, which refused to prosecute the theft; that certain named persons and businesses had disrupted distribution of the Northern Herald by refusing to sell the paper, by refusing to allow Steele to leave complimentary copies of it at their businesses, or by threatening to boycott stores that distributed it; and that business owners had denied service to Steele at restaurants and bars, a landlord had threatened a tenant (a friend of Steele's) with eviction if the tenant continued her relationship with Steele, and a printing press refused to print the Northern Herald.

Upon defendants' motions to dismiss or for summary judgment, the District Court held that (1) Steele (a non-

lawyer) could not represent the Northern Herald in these proceedings; (2) Steele failed to state a claim against the non-government and County defendants; and (3) City defendants were entitled to summary judgment because the City ordinances were constitutional, and because the individual City defendants were entitled to qualified immunity. See Steele v. City of Bemidji, 114 F. Supp. 2d 838 (D. Minn. 2000). This appeal followed, in which we review de novo both the District Court's grant of the motions to dismiss and its grant of summary judgment. See Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 557 (8th Cir. 1998); Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997).

At the outset, we agree with the District Court that Steele may not represent Northern Herald in federal court. See Knoefler v. United Bank of Bismarck, F.3d 347, 348 (8th Cir. 1994) (non- lawyer has no right to represent another entity in federal court). Therefore, we will review the District Court's rulings only as to Steele's individual claims. And, although Steele argues on appeal that be should have been allowed to amend his complaint, he cannot fault the District Court for failing to grant him leave to amend when he did not seek permission to do so.

Turning to the merits of Steele's action, we agree with the District Court that Steele cannot maintain an action against the non-government defendants under sections 1983, 1985, or 1986, see Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268-69 (1993) (conspiracy actionable under § 1985 must be motivated by class-based animus; persons who wish to engage in constitutionally protected conduct are not a class for § 1985 purposes); Brandon v. Lotter, 157 F.3d 537, 539 (8th Cir. 1998) (to be liable under § 1986, defendant must have neglected or refused to prevent a § 1985 conspiracy); Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996) (§ 1983 redresses only injuries caused by exercise of some right or privilege created by state, by rule of conduct imposed by

state, or by person for whom state is responsible). We reject Steele's argument that the mall is a state actor insofar as it reported Steele's activities to the police, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (to be considered state actor, private party must have "reached an understanding" with state officials to deny civil rights and have been "willful participant in joint activity with the State"). Further, defendants are not liable for the single instance of failing to prosecute the theft of copies of the Northern Herald. See Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694 (1978) (municipality is liable under § 1983 only for unconstitutional custom or policy); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (absolute immunity protects prosecutor from damages based on decision not to prosecute).

Steele also contends, as he did below, that the non-government defendants' alleged "boycott" is per se illegal under the Sherman Antitrust Act. We disagree. A boycott is a narrow category of per se violation "limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 458 (1986). Steele, moreover, has not shown an antitrust injury, see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977) (antitrust laws protect competition not competitors; private plaintiff must show injury reflecting anticompetitive effect either of violation or of anticompetitive acts made possible by violation), and he does not have standing to raise any possible claims by the Northern Herald in this regard. We also agree with the District Court that the boycott does not constitute wrongful activity upon which Steele could predicate a state-law claim for malicious interference with a business relationship. See Hunt v. Univ. of Minn., 465 N.W.2d 88, 95 (Minn. App. 1991) (claim for interference with prospective business relationship lies where defendant intentionally committed wrongful act that improperly interfered with prospective

relationship).

As to Steele's First Amendment challenge, the parties agree that his claims turn on the constitutionality of the City ordinances. Section 6.39 prohibits any "peddler, business solicitor, contribution solicitor ... or transient merchant" from engaging in "any such business" without obtaining a permit. To obtain a permit, an applicant must provide, among other things, his name; date of birth; physical description and photograph; address; a description of "the nature of the business and goods to be sold"; the length of time for which the right to do business is desired; two references to certify the applicant's "good character," or other evidence of good character and business responsibility; a statement of whether the applicant was convicted of any crimes; and fees as established by the City Council. After conducting any investigation deemed necessary, the Chief of Police, within five days, must certify that the applicant's good character and business reputation is "satisfactory" or state his reasons for denying the permit. An applicant can appeal the Chief of Police's denial to the City Council, although the ordinance does not specify standards for the Council's review. If the Chief of Police endorses the application, it is put on the agenda for the City Council's consideration at its next meeting. Upon Council approval, the applicant must submit a $1,000 bond or certified/cashier's check before receiving a permit. The permit expires sixty days after issuance.

Section 10.31 makes it unlawful for anyone to "place, deposit, display or offer for sale any fence, goods or other obstructions upon, over, across or under any public property without first having obtained a written permit from the Council." Before granting any permit, the Council "may impose such insurance or bonding conditions thereon as it, considering the projected danger to public or private property or to persons, deems proper." The ordinance does not specify how soon the Council must consider a permit application, nor does it state the duration of the permit.

Neither ordinance on its face proscribes giving away newspapers that the donor is holding while standing on a City sidewalk. Nevertheless, the City has applied, and apparently wants to continue to apply, the ordinances to Steele, whether or not he attempts to sell his newspapers and whether or not he places them on City property. The City's permit schemes are prior restraints on protected speech, but the City argues – and the District Court agreed – that they are constitutional as valid time, place, and manner restrictions. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (government may impose content-neutral time, place, or manner restrictions so long as they are narrowly tailored to serve significant government interest and leave open ample alternative channels for expression). But in our view, several salient features of the permit schemes run afoul of the First Amendment.

First, the permit schemes vest the City Council with too much discretion to discriminate against disfavored speech or unpopular speakers. See City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-59 (1988) (licensing scheme giving government unlimited discretion is facially unconstitutional; mere existence of such discretion, combined with power of prior restraint, intimidates speakers into censoring themselves even if discretion and power are never actually abused); Shuttlesworth v. City of Birmingham, 394 U.S. 147,149-50 (1969) (invalidating ordinance requiring city commission to issue permit unless in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused"). Also problematic is the solicitation permit's duration of only sixty days: a person might well be reluctant to distribute a newspaper criticizing a city council that has the unfettered discretion every two months to deny the person's right to distribute his product in public. See Lakewood, 486 U.S. at 758 (expressing similar concerns about city's year- long newsrack permits). Morever, the

solicitation ordinance allows the Chief of Police to deny any permit application under the vague ground that the applicant is not of "good character and business reputation." See Staub v. City of Baxley, 355 U.S. 313, 321 (1958) (invalidating ordinance because of unfettered discretion granted mayor, who was empowered to deny permits to applicants requesting permission to solicit others to join their organization, based on "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley"); Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147 (1939) (invalidating ordinance allowing police chief to deny permit to door-to-door solicitor if he determined applicant was "not of good character").

Second, section 6.39 requires a $1,000 bond or certified check before the applicant can receive a solicitation permit, and a section 10.31 obstruction permit is subject to "such insurance or bonding conditions" as the City Council may impose considering the projected danger to public or private property or to persons." In this regard, Felix's letter stated that Steele would need "a substantial bond" and "public liability coverage with policy limits equal to those required of the City." These requirements cannot be imposed as a prior restraint on protected speech. See Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (parade fee of "up to one thousand dollars for each day" was unconstitutional because ordinance did not articulate any standards for fixing amount of permit fee and allowed administrator to examine content of prospective speaker's message in assessing fee); cf. Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105,113-14 (1943) (ordinance charging flat fee per day for license to canvass or solicit was unconstitutional because "the license tax [wa]s fixed in amount and unrelated to the scope of the activities of

petitioners or their realized revenues").

Third, neither ordinance imposes a time limit on the City Council's decision to grant or deny a permit. See Riley v. Nat'l Fed'n of the Blind of N.C. Inc., 487 U.S. 781, 802 (1988) (regulation prohibiting speech until speaker obtains license must provide that licensor will "within a specified brief period, either issue a license or go to court") (citation and internal quotation omitted).

Accordingly, we reverse the District Court's grant of summary judgment as to Steele's First Amendment claims against the City defendants. We leave the question of qualified immunity to the District Court on remand. In all other respects, we affirm the judgment of the District Court.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. The Fourteenth Amendment to the United States Constitution:

Section 1.: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

....

Section 5.: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

C. Title 42, United States Code, Section 1981:

"§ 1981. Equal rights under the law

"(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) 'Make and enforce contracts' defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and

termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

D. Title 42, United States Code, Section 1983:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

E. Title 42, United States Code, Section 1985 (3):

"(3) Depriving persons of rights or privileges.

"If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor

of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

F. Title 42, United States Code, Section 1986:

"§ 1986. Action for neglect to prevent conspiracy

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after

the cause of action has accrued."

G. Title 42, United States Code, Section 1988:

"§ 1988. Proceedings in vindication of civil rights

"(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

"(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer

shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

"(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee."

H. Title 15, United States Code, § 1:

"§ 1. Trusts, etc., in restraint of trade illegal; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

I. Title 15, United States Code, Section 15 (relevant portions):

"§ 15. Suits by persons injured

"(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. ..."

J. Federal Rules of Civil Procedure, Rule 23.1:

"Rule 23.1. Derivative Actions by Shareholders

"In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

K. Title 28, United States Code, Section 1653:

"§ 1653 Amendment of pleadings to show jurisdiction

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

L. Title 28, United States Code, Section 1654:

"§ 1654. Appearance personally or by counsel

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the

rules of such courts, respectively, are permitted to manage and conduct causes therein."

III. OTHER RELEVANT MATERIAL

A. Para. V.-VII. of Affidavit of Adam Steele Accompanying Combined Memorandum in Opposition to Motions to Dismiss, of June, 2000

"V. That in early January 1998, I received a telephone call from a person who identified himself as William Batchelder and whose voice I recognized as same. Defendant William Batchelder is the nephew of Richard Morton, about whom an article had (then) recently appeared in Northern Herald. In said telephone conversation, said Batchelder informed me of numerous efforts by groups of people in Bemidji to suppress and damage the business of the Northern Herald there. He spoke of one group calling retailers, and another calling advertisers. He further spoke of some persons considering physical violence in retaliation for the article about Richard Morton but said that he'd advised them to use "lawful" means

"VI. At other times since, I have been approached by said William Batchelder, and he has spoken to me, with particularly specific information regarding the progress of the concerted boycott and other attempts to suppress the Northern Herald newspaper. For example, said Batchelder approached me, at the Bemidji post office, speaking of the theft by Defendant Lynette Rex of a stack of our copies, only days after the theft occurred.

"VII.Said Defendant William Batchelder stated to me, by telephone, that he had spoken with key employees of The Pioneer newspaper (owned by Defendant FORUM COMMUNICATIONS, INC.) just prior to Defendant Omar Forberg contacting Plaintiffs to inform them that The Pioneer would no longer do business (i.e. printing) with Plaintiffs."

(2)

Supreme Court, U.S.
FILED

011335 OCT 29 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Adam Steele, et al.,

Petitioners,

v.

City of Bemidji, et al.,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ORDER and REPORT AND RECOMMENDATION of the U.S. Magistrate, filed August 3, 2000

ORDER of the U.S. District Court, filed August 29, 2000

Adam Steele,
Petitioner pro se
P.O. Box 1535
Bemidji, MN 56619
218-759-1162

38 pgs

TABLE OF CONTENTS

A. ORDER and REPORT AND RECOMMENDATION of The Honorable United States Magistrate Judge RAYMOND L. ERICKSON, filed August 3, 2000 2

B. ORDER of The Honorable RICHARD H. KYLE, Judge of the United States District Court, filed August 29th, 2000 35

EDITOR'S NOTES:

1. [sic] marks. The Order and Report and Recommendation ("Order") is reproduced ad verbatim here, except for "[sic]" marks inserted sparingly as needed. Except for the one appearing in footnote 2, these "[sic]" marks are the Plaintiffs', and did not appear in the Order.

2. The Order and Report and Recommendation contains the following errors, which are mentioned here for clarity:

a. Rainbow Foods (p. 2, hereof) is not a named Defendant in the First Amended Complaint.

b. The defendant named in the Order as Alex Felix (p. 4, hereof) is properly Alan Felix.

c. Blackduck Restaurant (p. 4, hereof) is not a named Defendant - one of the two Countryside Restaurants is named as Countryside Restarant, Blackduck, Minnesota.

d. There are certain other errors and omissions re: parties defendant. For correct naming of parties, please see the First Amended Complaint, on file herein, or the Petition for a Writ of Certiorari, p. iii, on file herein.

We have, of course, probably made some typos of our own, of which we are not aware, and we leave it to the adverse parties to raise these, if necessary.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ORDER and REPORT AND RECOMMENDATION

Adam Steele and Northern Herald Publications, Inc., a Minnesota corporation,

Plaintiff,

vs.

The City of Bemidji, Minnesota, a Municipal Corporation; Alan Felix, individually and as City Attorney of the City of Bemidji, Minnesota; Phil Shealy, individually and as City Manager of the City of Bemidji, Minnesota; Sergeant Michael Porter, individually and as an officer of the Bemidji Police Dept.; Jon Hunt, individually and as an officer of the Bemidji Police Department; Robert Tell, individually and as Chief of Police of the City of Bemidji, MN; Tim Faver, individually and as County Attorney, County of Beltrami, MN; David Frank, individually and as Assistant County Attorney, Co. of Beltrami, MN; County of Beltrami, MN; Lynette Russell a/k/a Lynette Rex, an individual; Developers' Diversified Realty Corporation, an Ohio corporation d/b/a Paul Bunyan Mall, Inc.; Rich Johanneson, individually; Johanneson's, Inc.; Joseph Lueken, d/b/a Lueken's Food Stores; Joseph Lueken, individually; William Batchelder, individually; Terry Smart, an individual; Forum Communications Company, a corporation; Omar Forberg, Individually; Superamerica of Park Rapids; Petro Pete's; JB Foods; Rainbow Foods; Cenex Corp of Park Rapids; Countryside Restaurant of Blackduck, Minnesota; Countryside Restaurant of Bemidji, Minnesota; Maid-Rite Restaurant of Bemidji, Minnesota; Southside Restaurant of

Bemidji, Minnesota; Highway Host Restaurant of Bemidji, Minnesota; Kitty Lemmer, and individual; Festival Foods; and other unnamed persons and entities,

Defendants.

Civ. No. 99-1862 (RHK/RLE)

At Duluth, in the District of Minnesota, this 3rd day of August, 2000.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a special assignment, made in accordance with the provisions of Title 28 U.S. C. §636 (b) (1) (A) and (B), upon the Motions of the various Defendants to Dismiss or, in the alternative, for Summary Judgment.[1]

Hearings on the Motions were conducted on February

[1]Several of the Defendants, in addition to filing Motions to Dismiss, and/or for Summary Judgment, request that the Court impose sanctions against the Plaintiffs for the filing of this lawsuit. While the Plaintiffs' Complaint may be without legal merit, we have no evidence from which to conclude that it was filed in bad faith, or for an improper purpose. In addition, the Plaintiff Adam Steele's status, as a pro se litigant, militates against the imposition of sanctions. See, DePugh v. Clemens, 966 F. Supp. 898, 904 (W.D. Mo. 1997) (noting that a Court should consider the attorney's available time, the plausibility of the legal argument, the party's pro se status, and the complexity of the issues in determining whether the party made a reasonable inquiry as to the law); see also, Harrison v. Malchom, 664 F. Supp. 1110 (N.D. Ohio 1987) (adopting a liberal attitude towards pro se Plaintiffs). As such, the requests of the various Defendants' for an award of fees, and sanctions, is denied.

24, 2000, and on June 29, 2000, respectively, at which time, the Plaintiff, Adam Steele ("Steele"), appeared pro se; the Defendants, Forum Communications Co., and Omar Forberg (collectively referred to as "Forum") appeared by Angie E. Lord, Esq.; the Defendants City of Bemidji, Alex Felix, Phil Shealy, Michael Porter, Jon Hunt, and Robert Tell (collectively referred to as "the Bemidji Defendants") appeared by Jon K. Iverson, Esq.; the Defendants Lynette Russell, Joseph Lueken, Lueken's Food Stores, William Batchelder, Terry Smart, Cenex Corporation, Countryside Restaurant, Blackduck Restaurant, Country Side Restaurant, Maid-Rite Café, Southside Restaurant, Tim Saga, Highway Host Restaurant, and Festival Foods, (collectively referred to as "the Russell Defendants") appeared by Carl C. Drahos, Esq.; the Defendants County of Beltrami, Tim Faver, and David Frank (collectively referred to as "the Beltrami Defendants") appeared by Peter D. Bergstrom, Esq.; the Defendant J&B Foods ("J&B") appeared by Jennifer K. Eggers, Esq.; the Defendant Superamerica of Park Rapids ("Superamerica") appeared by Gregory D. Larson, Esq.; the Defendant Paul Bunyan Mall ("Mall") appeared by Teresa Jones, Esq. ; the Defendants Rich Johanneson, and Johanneson's Inc. (" Johanneson") appeared by Bradford J. Roegge, Esq.; the Defendant Petro Pete's ("Petro") appeared by Hassan Saffouri, Esq; and no appearance was made by, or on the behalf of the Plaintiff, Northern Herald Publications ("Northern Herald").

For reasons which follow, we recommend that the Motions of the Defendants be granted, thereby warranting the entry of a final Judgment in favor of each of the Defendants.

II. Factual and Procedural History

This action involves the Plaintiffs' claim, that the Defendants conspired to deprive them of their First Amendment Rights, by denying them the means to publish, or otherwise distribute, the Northern Herald newspaper.

On November 19, 1999,[2] Steele, and his newspaper company, Northern Herald, filed the original Complaint in this matter, which asserted claims against approximately thirty named parties, and "other unnamed persons and entities." In their Complaint, Steele and Northern allege that "[t]his case deals

---

[2]On the same date as his Complaint was filed, Steele applied to the District Court, the Honorable James M. Rosenbaum presiding, for a Temporary Restraining Order, which was issued, on that same date, in the form of a handwritten Minute Order, which was subsequently memorialized in a brief Order of November 23, 1999 [Docket No. 8]. In total, the Minute Order reads as follows:

> Plaintiffs [sic] motion for a TRO — Granted. Plaintiff may distribute material 5'-0" from the door of the Post Office. Plaintiff may not block access to public places. Bond in the amount of $5.00.

[Docket No. 6].

While, under Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1991) (en banc), one of the factors which must be considered, in granting injunctive relief, is the likelihood that the moving party will succeed on the merits of his claim, we read the District Court's grant of equitable relief as principally to effect a preservation of the status quo ante until such time as the Court could reexamine the issue. We draw this reading from the fact that, at the time of the Hearing on the Motion for a Temporary Injunction, none of the Defendants had been served with process, and only counsel for the City of Bemidji appeared, by telephone, at the Hearing. Now, upon a full consideration of the Record submitted, we find no basis to continue the injunction previously ordered for precautionary purposes, and we recommend that the injunction be dissolved with an entry of Judgment for the Defendants.

with the outright prohibition, by the Defendant, the CITY OF BEMIDJI, acting through its City Attorney, ALAN FELIX, of the distribution, by Plaintiffs, of a newspaper in Bemidji, in violation of the rights of the Plaintiff."' Amended Complaint, at ¶ 1. Further, according to the Plaintiffs' Complaint, this action also arises from an alleged concerted effort, by individuals and businesses, within the City of Bemidji, to disrupt the distribution of the Northern Herald, either by refusing to sell the paper, or by refusing to allow Steele to distribute it, at certain locations. In addition, Steele alleges that he has been denied service in restaurants, bars, and other locations, has had his newspapers stolen, and has been generally vilified within the community. This "anti-Steele" campaign, assertedly, is the result of Steele's publication, in the Northern Herald, of an article that was "sharply critical of one Richard Morton (deceased), who was the owner of a saloon in Bemidji which had been identified as 'a police hang-out'".[3]

Premised upon these allegations, the Plaintiffs have asserted several causes of action in their Complaint, including claims of: (1) failing to prevent a conspiracy, in violation of Title 42 U.S.C. §1986; (2) harassing Steele's First Amendment rights; (3) conspiring to interfere with Steele's civil rights, in violation of Title 42 U.S.C. §1985; (4) depriving Steele of his civil rights, in violation of §1983; and (5) maliciously interfering with a business advantage. Id. As such, Steele seeks injunctive relief, as well as damages in

---

[3]Morton's obituary appeared in the Northern Herald as follows:

> It is hard to speak positively of anyone's death, but the Bemidji community was greatly served by the removal of this dangerous and malicious person from it. It is like a piece of trash gone from our streets. * * * What goes around comes around * * *.

Affidavit of Terry Smart, Ex. A.

the amount of $600 billion. Id., at p. 21-22.

III. Discussion

At the outset, we address a threshold flaw in any claim asserted by the Northern Herald. Throughout the course of this litigation, Steele has purported to represent the interests of the Northern Herald, in which he is, apparently, the largest shareholder, as well as representing himself. As we expressed, at the time of our initial Pretrial Conference and, thereafter, throughout the subsequent stages of this litigation, under the controlling precedent of this, and other Circuits, a corporation may not be represented pro se. See, Minute Order of February 24, 2000, at 5, citing Simitar Entertainment, Inc. v. Silva Entertainment, 44 F. Supp.2d 986, 990 (D. Minn. 1999), citing, in turn, Ackra Direct Marketing Corp. v. Fingerhut Corp., 86 F.3d 852, 857 (8th Cir. 1996) (explaining that corporation was technically in default from the date that its counsel was permitted to withdraw without substitution); see also, United States v. Van Stelton, 988 F.2d 70, 70 (8th Cir. 1993); Eagle Associates v. Bank of Montreal, 926 F.2d 1305, 1308 (2nd Cir. 1991).

Further, it is also firmly established that a layperson may not represent a corporation in judicial proceedings, as a corporation may only appear by legal counsel. See, Minute Order of February 24, 2000, citing Simitar Entertainment, Inc. v. Silva Entertainment, supra at 990, citing, in turn, Mendenhall v. Goldsmith, 59 F.3d 685, 687 n. 1 (7th Cir. 1995) (dismissing appeal filed by layperson on behalf of corporation); In re America West Airlines, 40 F.3d 1058, 1059 (9th Cir. 1994) ("Corporations and other unincorporated associations must appear in Court through an attorney."). Even sole shareholders of corporations are prohibited from representing such corporations pro se. See, Cheung v. Youth Orchestra Foundation of Buffalo, Inc., 906 F. 2d 59, 61 (2nd Cir. 1990) ; Palazzo v. Gulf Oil Corp., 764 F. 2d 1381, 1385 (11th Cir. 1985) ; In re K.M.A., Inc., 652 F.2d 398, 399 (5th Cir.

1981); Capital Group, Inc. v. Gaston & Snow, 768 F. Supp. 264, 265 (E.D. Wis. 1991).

As we stated in our Minute Order:

> In response, Steele has cited to two cases from foreign jurisdictions, which stand for the proposition that, where the interests of the pro se litigant, and a closely-held corporation, are virtually synonymous, it is permissible for an agent of the corporation to represent the corporate entity before the Court. In the first of the cases cited by Steele, In re Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (E.D.N.Y. 1976), a principal in the corporation was allowed to appear for that corporation where each was bankrupt, and neither could afford a lawyer. The Holliday Court found that, "[t]o require this corporation to appear by a lawyer is effectively to exclude it and its sole shareholder from the courts." Id. at 183. Thus, the New York Court found a narrow exception to the general rule, when the rule's application would deny a potential litigant its day in court.
>
> Similarly, in United States v. Priority Products, Inc., 615 F. Supp. 593, 596 (CIT 1985), the United States Court of International Trade applied an exception to the general rule when the corporation is closely-held, or when it is, in effect, the "alter ego" of an individual, who is also a party to the action. In Priority Products, as in Holliday, the focus of the Court's concern was upon the [potential] that a corporate litigant would be denied access to the Courts solely on the basis of its limited financial status.

Minute Order of February 24, 2000, at 6-7.

In response to these decisions, we stated:

> Even if we were to adopt the holdings of the cases

> Steele cites, they are inapposite to the facts of this case, for there has been no competent showing that the absence of legal representation on Northern Herald's part is due to financial hardship. Unlike Holliday, Steele has not represented that he, or Northern Herald, is financially unable to retain the assistance of counsel. Rather, Steele merely represents that the absence of counsel for Northern Herald is the result of the refusal, by several attorneys, to assume the representation of that corporation. Under such circumstances, no exception to the general rule, that we have previously applied, appears.
>
> Notwithstanding what may, ultimately, prove to be a successful basis to challenge Northern Herald's claim, * * * we cannot now foreclose the potential that legal counsel will be secured * * *.

Id. at 7-8.

Despite this express forewarning, Steele has failed to retain legal counsel, on the Northern Herald's behalf, not because of any financial hardship but, rather, because of counsels' disinterest in his claims. As such, our indulgence ends, and therefore, Northern Herald should be dismissed from this action, by virtue of its failure to obtain legal counsel. Notwithstanding this ruling, we independently find, and hereinafter detail, that the legal claims of the Northern Herald are wholly without merit and, therefore, the dismissal of the Northern Herald is also counseled on the merits of the claims it has asserted.

A. Standard of Review. In considering a Motion to Dismiss under Rule 12(b) (6), Federal Rules of Civil Procedure, we accept as true, in a hypothetical sense, all of the factual allegations of the Complaint, and we view those allegations in a light most favorable to the nonmoving party — here

the Plaintiff. See, Riley v. St. Louis County of Missouri, 153 F.3d 627, 630 (8th Cir. 1998), cert. denied, 525 U.S. 1178 (1998); Anderson v. Franklin County, Mo., 192 F. 3d 1125, 1131 (8th Cir. 1999) ; Springdale Educ. Ass'n v. Springdale School Dist., 133 F. 3d 649, 651 (8th Cir. 1998). Under such an analysis, a Motion to Dismiss, for failing to state a claim, should only be granted if it is beyond doubt that no relief could be granted, under any set of facts, when the allegations are construed in a light most favorable to the pleader. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ; County of St. Charles v. Missouri Family Health Council, 107 F.3d 682, 684 (8th Cir. 1997), cert. denied, 522 U.S. 859 (1997).

In deferring to the well-pleaded factual allegations, the Court need not accept, as true, wholly conclusory allegations, or unwarranted factual inferences. See, Hanten v. School Dist. of Riverview Gardens, 183 F.3d 799, 805 (8th Cir. 1999); Springdale Educ. Ass'n v. Springdale School Dist., supra at 651; Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3rd Cir. 1997); LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1103 (6th Cir. 1995). Moreover, in treating the factual allegations of a Complaint as true, the Court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts." Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990), citing Morgan v. Church's Fried Chicken, 829 F. 2d 10, 12 (6th Cir. 1987).

B. Legal Analysis. Since they involve different legal considerations, we separately address the arguments of the Defendants, to the extent that they warrant separate analysis.

1. The Russell Defendants. As previously outlined, Steele seeks relief under Sections 1983, 1985, and 1986, in large part because of an alleged conspiracy among the various

Defendants to deny him his civil rights. Specifically, the crux of Steele's action against the Russell Defendants involves an alleged conspiracy, on their part, to prevent the sale of Steele's newspaper – the Northern Herald. According to Steele's Complaint: (1) Lueken, Cooperative Sampo, Jeff Wizner, Mrs. Wizner, Jacki Hall, Judy Black, Shari Mistic, Tim Saga, Saga of Bemidji, and Ron Dargis, conspired to interfere with Steele's First Amendment rights by refusing to allow Steele to distribute the Northern Herald within their private places of business; (2) Terry Smart refused to provide food and beverage service to Steele, in her restaurant, and conspired with others, known and unknown, to deprive Steele of bar and restaurant service, thereby depriving him of his civil rights; (3) Lynette Russell removed more than one copy of the Northern Herald from a public distribution stand, and conspired with prosecutors to avoid prosecution; and (4) William Batchelder violated Steele's civil rights by disparaging the Northern Herald to another private business owner, who then declined to distribute the Northern Herald. See, Plaintiff's Amended Complaint, at ¶¶ 10, 13, 15, 24, 32-34, 37, 40-43.

a. Steele's Section 1983 Claims. The Civil Rights Act of 1871 provides every citizen with a right of action, at law or in equity, against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." Title 42 U.S.C. §1983. In order to prevail on a Section 1983 claim, a plaintiff must establish that the actions complained of were committed by persons acting under color of State law, and that those actions deprived the plaintiff of a right, privilege, or immunity, which was secured by the Constitution, or by the laws of the United States. Id.; Hamilton v. Schriro, 74 F.3d 1545, 1549 (8th Cir. 1996), cert. denied, 519 U.S. 874

(1996); Thomas v. Gunter, 32 F.3d 1258, 1259 (8th Cir. 1994).

As a result of the "State action," requirement of Section 1983, the injuries, at issue, must have been caused by the exercise of some right, or privilege, that was created by the State, by a rule or conduct imposed by the State, or by a person for whom the State is responsible. Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996). Although "State action," for Section 1983 purposes, is ordinarily committed by officers and employees of a State governmental agency, Courts have, nonetheless, found that private parties can commit "State action." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) The test employed, in determining whether a private citizen's conduct constitutes "State action," is one of ascertaining whether the private citizen's conduct can be "fairly attributable to the State." Id.

Here, in the confines of Steele's Complaint, there is no allegation that the Russell Defendants were State actors, or that their decisions were attributable to the State, and therefore, Steele's Section 1983 claim against them must be dismissed. Even a liberal reading of the Complaint reveals that Steele has failed to allege that the Russell Defendants are State actors, or that their decision, to discontinue the distribution of the Northern Herald, or to refuse to serve Steele, within their private places of business, was attributable to the State. As such, under Section 1983, a viable claim has not been asserted against these Defendants.[4]

---

[4]Steele's Complaint, when read in its entirety, seems to imply that everyone in Bemidji, including State actors, conspired to keep the Northern Herald outside of the viable market. The Supreme Court has held, that an otherwise private person acts "under color of" State law when engaged in a conspiracy with State officials to deprive another of Federal rights. See, Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). However, 'mere allegations of joint action or a conspiracy do not demonstrate that * * * defendants acted

(continued . . .)

b. Steele's Claims under Section 1985. As noted, in addition to his claims under Section 1983, Steele alleges that all of the Defendants, including the Russell Defendants, acted in concert to make the Northern Herald unavailable to readers and, thereby, violated Section 1985. Section 1985 (3) prohibits conspiracies to interfere with civil rights, and reads, in pertinent part, as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property,

---

[4] (. . . continued)
under color of state law * * * [and] are not sufficient to survive a motion to dismiss." Fries v. Helsper, 146 F.3d 452, 457 (7th Cir. 1998). Consequently, even though we have indulgently read Steele's Complaint, and afforded it a broad reading, the dismissal of his Section 1983 claim would, nonetheless, be required.

> or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 U.S.C. 1985(3).

In order to state a claim for a civil rights conspiracy, under Section 1985(3), a Plaintiff must allege: (1) that the Defendants did "conspire," (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or equal privileges and immunities under the laws," (3) that one or more of the conspirators did, or caused to be done, "any act in furtherance of the object of the conspiracy," and (4) that another person was "injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States." Schneeweis v. Northwest Technical College, 1998 WL 420564 at *11 (D. Minn. June 1, 1998), citing Title 42 U.S.C. 1985 (3); see also, Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996); Occhino v. Lannon, 150 F.R.D. 613, 621 (D. Minn. 1993), aff'd, 19 F.3d 23 (8th Cir. 1994), cert. denied, 513 U.S. 840 (1994).

Here, two defects render Steele's Section 1985 claim, against the Defendants, untenable as a matter of law. First, in order to elude "the constitutional shoals that would lie in the path of interpreting 1985(3) as a general federal tort law," Griffin v. Breckenridge, 402 U.S. 88, 102 (1971), "the Supreme Court has interpreted it to apply only to conspiracies which were motivated by an invidious, class-based, discriminatory animus." Schneeweis v. Northwest Technical College, supra at *12, citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993); United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 834-35 (1983). Under this interpretation, Steele must allege a discriminatory purpose

"in that the defendants selected the particular course of action 'because of not merely in spite of its adverse effects upon an identifiable group.'" Schneeweis v. Northwest Technical College, supra at *12, citing Andrews v. Fowler, 98 F.3d 1069, 1079-80 (8th Cir. 1996), in turn quoting Bray v. Alexandria Women's Health Clinic, supra at 272.

Here, Steele's Complaint is devoid of any suggestion that the alleged conspiracy, among the Defendants, was motivated by an invidious, class-based animus against him, and he has neglected to identify himself as a member of any protected class. Where, as here, the Plaintiff has not alleged that the Defendants were motivated by a class-based, discriminatory animus, he has failed to state a Section 1985(3) claim. See, Rasmussen v. Larson, 863 F.2d 603, 605 (8th Cir. 1988); Dunn v. Tennessee, 697 F.2d 121, 124 (6th Cir. 1983). Further, even if Steele's Complaint contained such an allegation, it is clear that he, and the Northern Herald, are not members of a protected class, as contemplated by section 1985.[5] See, e.g., Hutchens v. Beckman, 521 F. Supp. 426, 429 (S.D. Ga.1981) (holding that newspaper publishers are not a protected class under Section 1985). As such, Steele's Section 1985 claim should be dismissed.[6]

---

[5]In his combined Memorandum, Steele contends that his Complaint states a valid claim, under the Sherman Anti-Trust Act. However, a review of Steele's Complaint reveals that it is devoid of any reference to the Sherman Anti-Trust Act. Specifically, Steele's Amended Complaint states, as pertinent, "[a]dditionally, Plaintiff asserts [a] claim for relief *** under such other laws of the United States, *** including but not limited to anti-trust provisions, * * * as may be applicable." Amended Complaint, at ¶ LXI. As a consequence, the Complaint fails to conform to the procedural requirements of Rule 8(a), Federal Rules of Civil Procedure, and even if we were to find that a valid Sherman

(continued . . .)

C. Malicious Interference with a Business Advantage. Read liberally, Steele's Complaint could be construed to allege that the various Defendants, in this action, collectively

---

[5] (. . . continued)
Anti-Trust Act claim had been raised, by Steele, its dismissal would be required, because his Complaint lacks any allegation that trade has been restricted so as to affect interstate commerce. In order for a Federal Court to assert jurisdiction, under a Sherman Anti-Trust Act claim, there must be an allegation that interstate commerce has been affected by the restraint of trade. See, Alabama Homeowners, Inc. v. Findahome Corp., 640 F.2d 670 (5th Cir. 1981) (dismissing anti-trust action because there was no evidence that the publication of real estate guides, to two Alabama Counties, had a substantial affect [sic] on interstate commerce). Here, Steele's Complaint claims that the actions of the referenced Defendants have limited the distribution of the Northern Herald within the City of Bemidji, and elsewhere, in northern Minnesota. However, there is no allegations [sic] that interstate commerce has been adversely affected.

[6]Because Steele has failed to state a valid claim against the Defendants, under Section 1985, his Section 1986 claim must be dismissed. Where no action is permitted under Section 1985, no action will lie under Section 1986. See, McCalden v. California Library Assoc. 955 F.2d 1214, 1223 (9th Cir. 1990), cert. denied 504 U.S. 957 (1992). Section 1986 is a misprision statute and is derivative in nature. See, McIntosh v. White, 582 F. Supp. 1244, 1250 (E.D. Ark. 1984). "It is axiomatic that if the plaintiff is unable to state or prove a claim under Section 1985, the derivative claim under Section 1986 must fail as well,." Id., citing Williams v. St. Joseph Hosp., 629 F. 2d 448 (7th Cir. 1980); Tollette v. Laham, 497 F.2d 1231 (8th Cir. 1974). Consequently, as Steele's Section 1985 claim cannot survive, his Section 1986 claim must also be dismissed.

conspired, and acted, in a manner that discouraged the distribution of the Northern Herald, by encouraging private businesses to discontinue its sale within their places of business.[7] According to Steele, these allegations state a claim for a malicious interference with a business advantage.

In Minnesota, the tort of intentional interference with a business advantage has been applied once, in the case of Tuttle v. Buck, 107 Minn. 145, 146, 119 N.W. 946, 946 (Minn. 1909). There, the plaintiff owned a barber shop, and alleged that the defendant maliciously opened another barbershop solely as an effort to destroy the plaintiff's business. Specifically, the Plaintiff alleged that:

> [T]he defendant, wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business and compel plaintiff to abandon the same. That to that end he has persistently and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given.

Id.

According to the Minnesota Supreme Court, these specific allegations were sufficient to state a cause of action, against the defendant barber shop owner.

In contrast, Steele has failed to proffer any specific allegations

---

[7]Specifically, Steele's Complaint alleges that "[t]he Defendants, who are named as 'other unnamed persons and entities' includes a group of Defendants that have organized and acted in concert to discourage and prevent, both by lawful and unlawful means, the sale or other distribution of the Northern Herald in Bemidji." Amended Complaint, at ¶ X.

that would be sufficient to state a valid claim, under the holding in Tuttle. Specifically, Steele has failed to allege that any of the specific parties, who are named in his Complaint, acted maliciously in an effort to prevent the distribution of the Northern Herald. In his Complaint, Steele alleges that a group of unknown Defendants approached the Defendants, who are named in the Complaint — i.e., various private business owners in the Bemidji area — and encouraged them, by using intimidation and threats of a boycott, to refuse to distribute the Northern Herald. See, Amended Complaint, at ¶ XLI.[8] However, Steele's Complaint fails to allege that any of the named Defendants committed overt acts, in an attempt to inhibit the distribution of the Northern Herald.

Rather, according to Steele's Complaint, the Defendants were the targets of those who attempted to hinder the Northern Herald's distribution and, therefore, by those who elected to discontinue their business relationship with Steele. Such actions are insufficient, however, to provide a basis for his claimed cause of action. As the Supreme Court stated, in Federal Trade Commission v. Raymond Brothers - Clark, Co., 263 U.S. 565, 574 (1924):

> It is the right, 'long recognized,' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to the parties with whom he will deal.' United States v. Colgate & Co., 250 U. S. 300, 307 (1909), see also United States v. Freight Ass'n, 166 U. S. 290, 320 (1897); Due0ber [sic] Watch-Case Co. v. Howard Watch Co., 66 Fed. 637,

---

[8]Steele's Complaint also alleges that the Defendant William Batchelder personally approached a retailer in Bemidji and persuaded it to discontinue its distribution of the Northern Herald. See, Complaint, at ¶ XLII. However, this single act, without more, is insufficient to state a claim for malicious interference with a business advantage, as outlined in Tuttle v. Buck, 119 N.W. 946 (Minn. 1909).

645 (2nd Cir. 1895); Great Atlantic Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48 (2nd Cir. 1915); Wholesale Grocers' Ass'n v. Trade Comm., 277 Fed. 657, 664 (5th Cir. 1922) ; Mennen Co. v. Trade Comm., 288 Fed. 774, 780 (2nd Cir. 1923); Booth v. Burgess, 72 N. J. Eq. 181, 190; 2 Cooley on Torts (3d Ed.) 587. Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons satisfactory to himself.' Eastern States Lumber Co. v. United States, 234 U. S. 600, 614 (1914); United States v. Colgate & Co. , supra, 250 U. S, 307. * * * Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.'

As private businesses, the Defendants in this action, including the Russell Defendants — who refused to do business with Steele —cannot lawfully be forced, against their will, to distribute a publication which they find to be offensive. As such, Steele's claim for a malicious interference with a business advantage, must be dismissed.

2. Steele's Claims against J&B. In his Complaint, Steele alleges that, along with the Russell Defendants, J&B was involved in a conspiracy to deprive Steele of his civil rights, in violation of Section 1985, by refusing to allow the distribution of the Northern Herald. With no particular reference to J&B, Steele also alleges, under Section 1983, a cause of action, by broadly stating that "[t]he action by Defendants * * * constitutes Deprivation of Civil Rights under 42 U.S.C. Sec. 1983, by way of interfering with First Amendment rights in places, open to the public, which are public places for the exercise of First Amendment rights." Amended Complaint, at ¶ XLV. Steele also broadly alleges claims against "the Defendant" for malicious interference with a business advantage. Although it is unclear whether J&B is included within these causes of action, it is evident that J&B's dismissal is appropriate, on the legal grounds that we have previously detailed, and need not now repeat.[9]

3. Steele's Claims against the Beltrami Defendants. The Beltrami Defendants, Tim Favor ("Favor") [sic] , and David Frank ("Frank"), are a part of this lawsuit, because of their positions as the County Attorney, and assistant to the County Attorney, of the Defendant Beltrami County.[10] In his Compliant, Steele contends that these Defendants are legally responsible for damages, because they failed to criminally prosecute a person, who was identified by Steele, for the theft of newspapers from a café in Bemidji. See, Amended Complaint, at XXXII - XXXIV.

As urged by the Beltrami Defendants, Steele's claims against Favor and Frank should be dismissed, because of the absolute immunity that prosecutors enjoy from civil suits when engaged in their official duties as a prosecutor. See, Imbler v. Pachtman, 424 U.S. 409, 431 (1976). "A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should

---

[9]For purposes of brevity, we will forego a discussion of the basis for the dismissal of Johanneson, Superamerica, Mall, and Petro, from this cause of action. Suffice to say, the allegations against these Defendants are substantively the same, as those that were proffered against the Russell Defendants, and J&B. Essentially, these Defendants merely represent additional private businesses that, by refusing to distribute the Northern Herald, became embroiled within this lawsuit. The legal basis for the dismissal of these Defendants is substantively the same as those which applied to the Russell Defendants, and J&B. Therefore, further discussion of these same issues would be redundant.

[10]The City of Bemidji has entered into a contract with the County of Beltrami, and the County Attorney, to have the County Attorney prosecute misdemeanors.

be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987). "Absolute immunity protects a prosecutor from damages based on his decision not to prosecute." Mullen v. United States, 1991 WL 219414 at *2 (W.D. Mo. 1991), citing Schloss v. Bouse, 876 F.2d 287, 290 (2nd Cir. 1989).

Here, Steele appears to assert that he has a constitutionally guaranteed right to have persons, whom he has identified as being thieves, prosecuted. Steele also contends that since Favor and Frank failed to prosecute the alleged thieves, they are liable for damages. As noted, however, this claim has no legal basis, since there is no individual right to have another person prosecuted for a crime. Decisions on whether to prosecute an individual rest solely with the prosecutor, and are entitled to absolute immunity from damages claims from persons dissatisfied with the decision made. Accordingly, this aspect of Steele's Complaint should be dismissed.

Further, with respect to Steele's claim against the County, it is clear that this claim should be dismissed, because Steele has failed to allege that his claimed damages are the result of any unconstitutional policy or custom on the part of the County. It is by now hornbook law that a municipality may not be held vicariously liable, under Section 1983, for the unconstitutional acts of it [sic] employees. See, Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978); Mettler v. Whitledge, 165 F.3d 1197, 1204 (8th Cir. 1999); Frey v. City of Herculaneum, 44 F.3d 667, 672 (8th Cir. 1995). Rather, to prevail on his Section 1983 claim, which seeks to impose liability upon the County, Steele must prove that the County had an official policy, or a widespread custom, that was the moving force behind a constitutional violation. See, Artis v. Francis Howell North Band Booster Ass'n, Inc., 161 F.3d 1178, 1181 (8th Cir. 1998), citing Monell v. Department of Social Servs., supra at 694; Board of County Comm'rs of Bryan

County, Okla. v. Brown, 520 U.S. 397, 403 (1997); Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649, 651 (8th Cir. 1998); Corwin v. City of Independence, 124 F.3d 967, 467 (8th Cir. 1996); see also, Martt v. City of Maplewood, 57 F.3d 680, 684 (8th Cir. 1995). The requirement of an official policy ensures that a municipality is liable only for those acts which may fairly be said to be those of the municipality. See, Artis v. Francis Howell North Band Booster Ass'n, Inc., supra. "An alleged illegal custom must be widespread and may only subject a [municipality] to liability if it is pervasive enough to have the 'force of law.'" Id. Here, Steele has failed to allege that the County's behavior was the result of the existence of a policy or custom, therefore, this claim should be dismissed.[5]

---

[5]Steele also alleges that, under Vives v. County of Monroe, 364 F. Supp. 1327, 1330 (E.D. Mich. 1973), he is entitled to a respondeat superior theory of recovery on his Section 1986 claim against the County. Steele never directly alleges this claim, in his Complaint, against the County. However, if such a claim had properly been pled, its dismissal would be required, because a Section 1986 claim cannot be brought against a municipality. As the Court observed in Vives:

> [The] plaintiff bases his cause of action on §1986. That section makes liable every "person" who, having knowledge of certain wrongs conspired to be done, and having the power to prevent those wrongs, neglects to do so. The "wrongs" referred to are the wrongs "mentioned in §1985." Thus, by its own terms, 1986 is to be read in conjunction with 1985. Moreover, §1986 was enacted as part of the same Civil Rights Act of 1871, 17 Stat. 13, of which §1985 is a part. Since §1986 shares with §1985 a common legislative source, since both sections use the word "'persons' to identify proper defendants, and since both were enacted by the same Congress which believed it could not

(continued . . .)

4. Steele's Claims against Forum. In addition to his claims against the City of Bemidji, city officials, law enforcement officers, and the residents and businesspeople of the City of Bemidji, Steele's Complaint contains allegations directed against Forum, as follows:

> Defendant FORUM COMMUNICATIONS, INC. is in the business of printing newspapers in Bemidji. As a printer, it performs contract printing for many independent local and regional newspapers. * * * Defendant OMAR FORBERG is an employee of Defendant FORUM COMMUNICATIONS, INC., and is the highest ranking officer over [its] Bemidji operations. * * * Since September, 1995, Plaintiff[s] * * * had contracted with Defendant FORUM COMMUNICATIONS, INC. and [its] predecessor owners * * * for printing of the Northern Herald newspaper. * * * In January, 1998, Defendant OMAR FORBERG told Plaintiff ADAM STEELE that Defendant FORUM COMMUNICATIONS, INC. would no longer print the Northern Herald Newspaper. * * * As a result of the actions of Defendants OMAR FORBERG and FORUM COMMUNICATIONS, INC., Plaintiffs have sustained damages by way of additional time and expense to have the Northern Herald newspaper printed elsewhere, and have suffered damage due to

---

[11] (. . . continued)

> constitutionally impose civil liability on municipalities, the word "persons" must carry the same meaning in each section. For this reason, the County of Monroe, since it is not a "person" within the meaning of §§1983 or 1985, is similarly not a "person" for purposes of 1986.

Id.

As this holding makes clear, the dismissal of Steele' s cause of action against the County, under Section 1986, is required.

deprivation of First Amendment rights.
Amended Complaint, at ¶¶ XLVIII - LII.
As alleged in Steele' s Complaint, these assertions provide the basis for Steele' s claims against Forum, under Sections 1983, 1985, and 1986, as well as for his claim of malicious interference with a business advantage. However, because the Forum Defendants are private actors, who merely refused to do business with Steele, their dismissal from this cause of action is required, under the same bases which mandate the dismissal of the Russell Defendants, J&B, Johanneson, Superamerica, Mall, and Petro.

5. Steele's Claims against the Bemidji Defendants. Collectively, in addition to the City itself, the Bemidji Defendants are comprised of the City Attorney, the City Manager, the Chief of Police, and two police officers, from the City of Bemidji. As outlined in Steele's Complaint, the Bemidji Defendants are a part of this lawsuit primarily because of their enforcement of Bemidji City Ordinances 10.31, and 6.39, and because of the Bemidji Police Department's role in refusing to prosecute individuals for the alleged thefts of the Northern Herald from public distribution stands.

Specifically, according to Steele's Complaint, on August 6th, 1998, Alan Felix ("Felix"), the Bemidji City Attorney, wrote a letter to Steele, which read as follows:

> Your alleged "Notice of Claim" has brought to my attention the fact that you are using and have attempted to use public property to personally advertise and sell your alleged publication without first having obtained a Solicitation Permit under Section 6.39 of the City Code, not to mention a written permit from the City Council to use public property as is required under City Code Section 10.31. In issuing either permit, the City may impose reasonable time and place conditions/restrictions.
>
> * * *

> Additionally, , neither permit entitles occupation of a stationery location and, if granted, a permit is subject to the judgment of law enforcement whether such operation might impede or inconvenience the public use of such property.
>
> * * *
>
> Also, be advised that a violation of any one or other of the City Code sections mentioned in this notice is a misdemeanor. If you find these code requirements onerous, I can suggest that you consider the industry-wide use of a pay distribution box to dispense your product. It is unfortunate if you cannot find willing local, private outlets. Of course, in light of this community's apparent unwillingness to embrace your ideas, another option may be your consideration of relocation to another community within this State or elsewhere which may be less concerned about the safety of its citizens and more willing to embrace your way of thinking.

Amended Complaint, Ex. A.

According to Steele, this letter was just the initial step in the prohibition, by Felix, of the sale or free distribution of the Northern Herald at curbside. See, Amended Complaint, at ¶ XV. Apparently, several days after his receipt of the letter, Steele was approached by the Defendant Michael Porter ("Porter"), who is a member of the City of Bemidji Police Department, while Steele was distributing the Northern Herald in front of the Bemidji Post Office, and was told that, if he continued his distribution, he would be arrested. Id. Steele was then informed that this curbside distribution was a violation of the Bemidji City Ordinance. Id. at ¶ XIX.

As argued by Steele, Felix further acted to impede the distribution of the Northern Herald by failing to prosecute past thefts of the paper, and by requiring that requests, by Steele, for public information, be submitted in writing, and submitted for approval. Id. at ¶ XXI, XXIII. In addition, Steele

contends that other officers from the Bemidji Police Department acted to prevent him from distributing the Northern Herald in front of the Paul Bunyan Mall, which is located within the City of Bemidji. Id. at ¶¶ XXVII-XXVIII.

In response to these allegations, the Bemidji Defendants have filed a Motion to Dismiss or, alternatively, for Summary Judgment.

a. Standard of Review. Summary Judgment is not an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut when there are no issues which require the unique proficiencies of a Jury in weighing the evidence, and in rendering credibility determinations. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary Judgment is appropriate when we have viewed the facts, and the inferences drawn from those facts, in a light most favorable to the nonmoving party, and we have found no triable issue. Carter v. St. Louis Univ., 167 F.3d 398, 400 (8th Cir. 1999); Prudential Ins. Co. v. National Park Med. Center, Inc., 154 F. 3d 812, 818 (8th Cir. 1998). For these purposes, a disputed fact is "material" if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine" if the evidence is such that a reasonable Jury could return a verdict for the nonmoving party. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ; Liebe v. Norton, 157 F.3d 574, 578 (8th Cir. 1998); Dodd v. Runyon, 114 F.3d 726, 729 (8th Cir. 1997).

As Rule 56(e) makes clear, once the moving party files a properly supported Motion, the burden shifts to the nonmoving party to demonstrate the existence of a genuine dispute. In sustaining that burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56 (e) , Federal Rules of Civil Procedure; see also, Anderson v. Liberty Lobby, Inc., supra at 256; Chism v. W.R. Grace & Co., 158 F.3d 988, 990 (8th Cir. 1998). Moreover, the

movant is entitled to Summary Judgment where the nonmoving party has failed "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra at 322; see also, Greer v. Schoop, 141 F.3d 824, 826 (8th Cir. 1998); Mayard v. Hopwood, 105 F.3d 1226, 1228 (8th Cir. 1997). No genuine issue of fact exists in such a case because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, supra at 323; see also, Bell Lumber and Pole Co. v. United States Fire Ins. Co., 60 F.3d 437, 441 (8th Cir. 1995); McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 510 (8th Cir. 1995); Settle v. Ross, 992 F.3d 162, 163 (8th Cir. 1993).

b. Legal Analysis. As we have already noted, under Section 1983, relief is available only when the claimant has been deprived of some constitutional right by a person who was acting under color of State law. See, West v. Atkins, supra at 48. Here, Steele's Complaint properly alleges that the Bemidji Defendants are State actors, who were acting under the color of State law, when his constitutional rights were violated. As such, Steele's Section 1983 pleadings are sufficient to withstand a Motion to Dismiss, under Rule 12(b) (6), Federal Rules of Civil Procedure.[12] Nevertheless, a review of the evidence submitted by Steele, and the Bemidji Defendants, demonstrates that the Bemidji Defendants Motion for Summary Judgement should be granted.

---

[12]Steele's claims against the Bemidji Defendants, under Title 28 U.S.C. §§1985 and 1986, should be dismissed on the grounds previously addressed. In addition, because Steele has failed to allege that the Bemidji Defendants acted overtly in an attempt to prevent the distribution of the Northern Herald at any of the numerous private businesses within the City of Bemidji, his claim for a malicious interference with a business advantage should also be dismissed, as it relates to these Defendants.

As argued by Steele, the enforcement of the Bemidji Solicitation Ordinance, by the Bemidji Defendants, violated Section 1983, because the Ordinance is unconstitutional on its face. Bemidji City Code Section 6.39 regulates solicitors within the City of Bemidji, and provides as follows:

> It is unlawful for any peddler, business solicitor, contribution solicitor, * * * or transient merchant to engage in any such business within the City of Bemidji without first obtaining a permit * * * in compliance with the provisions of this ordinance.
>
> The terms of this ordinance do not include the acts of persons selling property at wholesale to dealers in such articles, nor to newsboys * * *.

Bemidji City Code Section 6.39, Subdivision (3)(8).[13]

As noted by these Defendants, Steele will not be able to prevail on his Section 1983 claim against the Bemidji Defendants, unless he establishes that Sections 6.39, and 10.31,[14] are unconstitutional on their face, or are being

[13]Steele claims that he falls within the newsboy exception to the Bemidji City Ordinance, however, the Ordinance specifically excludes only "an attempted solicitation of a newspaper subscription in which the solicitor is a minor child engaged in both the delivery and sale of the newspaper." Memorandum in Support of the Bemidji Defendants Motion to Dismiss, or for Summary Judgment, Affidavit of Jon K. Iverson, Ex. C, Bemidji City Code Section 6.39, Subdivision (2)(G) [emphasis added].

[14]Bemidji City Code Section 10. 31 regulates public obstructions by making it "unlawful for any person to place, deposit, display or offer for sale, any fence, goods, or other obstructions upon, over, across, or under any public property without first having obtained a written permit from the Council, and then only in compliance in all respects with the terms and conditions of such permit, and taking precautionary measures for the protection of the public * * *."

applied in a discriminatory manner. See, United States v. O'Brien, 391 U.S. 367, 377 (1977). In determining the constitutionality of the Ordinances, we must scrutinize them under the Supreme Court's test for determining whether a statute violates the First Amendment's freedom of speech guarantee. As stated in Arlington County Republican Comm. v. Arlington County, Va., 983 F.2d 587, 593 (4th Cir. 1993):

> Under this test, we first question whether the [ordinance] burdens any speech. If we find any burden, we must then determine whether the [ordinance] imposes content neutral or content based restrictions. If it is content neutral, we must then decide whether the [ordinance] serves any substantial interest of [the City]. If the [City] identifies any interest, we must then determine whether the [City] narrowly tailored the [ordinance] to further this stated interest. Finally, we must also assess whether the [ordinance] leaves open ample alternative means for communicating the desired message. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. O'Brien, 391 U.S. 367, 377 (1968).

Although the Bemidji Ordinances burden speech, it is clear that they do so in a content-neutral manner.[15] Both Section 6.39, and Section 10.31, restrict the ability of individuals from "selling," or "peddling" goods, without regard to the type of goods that are being distributed. In addition, both Ordinances benefit the City of Bemidji's legitimate, substantial interests by controlling the number of street peddlers, and vendors, that are allowed to conduct their

[15]The Bemidji Defendants admit, for the purposes of this Motion, that the questioned Ordinances could "prevent [Steele] from distributing the Northern Herald whenever, wherever and however he wants." Memorandum in Support of the Bemidji Defendants Motion to Dismiss, at 14.

business within the City, particularly on public streets and walkways. Regulating this type of conduct is important for the safety and convenience of citizens, who are attempting to use the City's streets and walkways for different types of transportation.

Moreover, with respect to Section 6.39, the City of Bemidji is attempting to regulate individual solicitors, so as to preserve the aesthetics of the City, and in order that consumers would not be harassed, and thereby deterred, from shopping at the City's numerous retail outlets. As the Supreme Court explained, in Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984):

> In Kovacs v. Cooper, 336 U.S. 77, 69 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in protecting its citizens from unwelcome noise. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the Court upheld the city's prohibition of political advertising on its buses, stating that the city was entitled to protect unwilling viewers against intrusive advertising that may interfere with the city's goal of making its buses "rapid, convenient, pleasant, and inexpensive." * * * These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

Similarly, the Supreme Court has made clear that concerns for traffic safety represent substantial municipal interests. See, Metro-media, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981), citing Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). Since the City of Bemidji's Ordinances

serve a substantial public interest, we must determine whether these Ordinances have been narrowly tailored so as to serve those interests. Here, the Ordinances merely require street vendors to obtain a permit prior to engaging in the prohibited conduct. As argued by the Bemidji Defendants:

> The permit application itself is restricted to information on the type of business that will be conducted and information on the applicants criminal and business background. The ordinances limit the discretion of City officials to deny or restrict permits by requiring a standard investigation by the local police and a full and open hearing by the city council.

Memorandum in Support of the Bemidji Defendants Motion to Dismiss, at 16.

These processes serve to ensure that individuals, who wish to legitimately distribute materials within the City of Bemidji, such as the Northern Herald, may do so, while prohibiting only those who are likely to harass citizens, or disrupt public safety. As such, the Bemidji Ordinances appear narrowly tailored to further the City's legitimate, substantial interests.

Finally, and most importantly, the challenged Ordinances leave open the possibility for alternative channels of communication. Both Ordinances allow for sales of publications from existing businesses, complimentary distribution by leaving stacks of newspapers at commercial establishments, and for the operation of coin operated distribution boxes. Further, individuals who are unable to obtain a permit are free to distribute their products or publications via the mails. These factors demonstrate that the Bemidji City Ordinances leave open a variety of alternative means by which an individual can communicate a desired public message. As such, neither Section 6.39, nor Section 10.31, are unconstitutional.

Moreover, because the Bemidji Defendants are entitled a

to [sic] qualified immunity, Steele's Section 1983 claim cannot survive their Motion for Summary Judgement. Government officials are entitled to a qualified immunity from liability so long as their challenged conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known at the time the action occurred." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To overcome an assertion of qualified immunity at the Summary Judgment stage, "a plaintiff must assert a violation of a constitutional or statutory right; that right must have been clearly established at the time of the violation; and given the facts most favorable to the plaintiff, there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action indeed violated that right." Mettler v. Whitledge, 165 F.3d 1197, 1202 (8th Cir. 1999), quoting Liebe v. Norton, 157 F.3d 574, 577 (8th Cir. 1998).

We have already concluded that Sections 6.39, and 10.31 are constitutional, and therefore, their enforcement, by the Bemidji Defendants, does not violate any of Steele's clearly established rights. Further, although Steele contends that his rights were violated, by the Bemidji Defendants', and that the Beltrami Defendants' decision, not to prosecute the alleged thieves of copies of the Northern Herald, we have already rejected this argument, because of the absolute immunity afforded to prosecutors in making such decisions. Finally, while Steele contends that his rights were somehow violated by Felix's request that his petitions for information, to the City, be made in writing, he has failed to present any evidence to demonstrate that any of his requests were denied and, therefore, he cannot demonstrate that any of his constitutional or statutory rights were violated. Therefore, we recommend that the Bemidji Defendants' Motion for Summary Judgment be granted, in all respects.

NOW, THEREFORE, It is —
ORDERED:

That the Russell Defendants' Motion for monetary sanctions [Docket No. 64] is DENIED.

AND, It is –
RECOMMENDED:

1. That Forum's Motions to Dismiss [Docket Nos. 10 and 39] be granted.
2. That J&B's Motion to Dismiss [Docket No. 51] be granted.
3. That Petro's Motion to Dismiss [Docket No. 57] be granted.
4. That the Beltrami Defendants' Motion to Dismiss [Docket No. 59] be granted.
5. That the Russell Defendants' Motion to Dismiss [Docket No. 64] be granted.
6. That Johanneson's Motion to Dismiss [Docket No. 79] be granted.
7. That Developers Diversified Realty Corporation's Motion to Dismiss [Docket No. 82] be granted.
8. That the Bemidji Defendant's Motion to Dismiss, or in the alternative, for Summary Judgment [Docket No. 88] be granted.
9. That Superamerica's Motion to Dismiss be GRANTED.[16]
10. That the Injunction, which was issued by the District Court, on November 19, 1999, be summarily dissolved.

---

[16]Although Superamerica failed to file a formal Motion to Dismiss with the Clerk of Court, it did submit, prior to the Hearing, a Memorandum in Support of its Motion to Dismiss. Also, at the Hearing, Superamerica appeared by Gregory D. Larson, Esq., to argue for its dismissal, and no party, including Steele, or the Northern Herald, objected to that appearance. As such, we view Superamerica's procedural miscue to be harmless, and recommend that it be dismissed from this action.

[s/]
Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a) Federal Rules of Civil Procedure, D. Minn. LR1.1 (f), and D. Minn. LR72.1 (c) (2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties by no later than August 18, 2000, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing by no later than August 18, 2000, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. §636 to review the transcript in order to resolve all of the objections made.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Adam Steele and Northern Herald Publications, Inc., a Minnesota corporation,

Plaintiffs, Civil 99-1862 (RHK/RLE)

vs. ORDER

The City of Bemidji, Minnesota, a Municipal corporation, et al.,

Defendants.

Before the Court are Plaintiffs' Objections to the August 3, 2000 Report and Recommendation of Magistrate Judge Raymond L. Erickson. This Court has conducted the required de novo review of the objected to portions of the Report and Recommendation. That review satisfies the undersigned that Judge Erickson's recommendations are fully supported by the facts and the law. Accordingly, the Report and Recommendation will be adopted.

Upon all the files, records and proceedings herein, IT IS ORDERED:

1. The Objections (Doc. No. 110) are OVERRULED;

2. The Report and Recommendation (Doc. No. 108) is ADOPTED;

3. Forum's Motions to Dismiss (Doc. Nos. 10 and 39) are GRANTED;

4. J&B's Motion to Dismiss (Doc. No. 51) is GRANTED;

5. Petro's Motion to Dismiss (Doc. No. 57) is GRANTED;

6. The Beltrami Defendants' Motion to Dismiss (Doc. No. 59) is GRANTED;

7. The Russell Defendants' Motion to Dismiss (Doc. No. 64) is GRANTED;

8. Johannesson's Motion to Dismiss (Doc. No. 79) is GRANTED;

9. Development Diversified Realty Corporation's Motion to Dismiss (Doc. No. 82) is GRANTED;

10. The Bemidji Defendant's Motion to Dismiss, or in the alternative, for Summary Judgment (Doc. No. 88) is GRANTED;

11. Supervaluesrival's Motion to Dismiss (see footnote 16 of the Report and Recommendation) is GRANTED;

12. The Injunction, which was issued by the District Court on November 18, 1999, is DISSOLVED; and

13. The Complaint is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 29, 2000

s/
RICHARD H. KYLE
United States District Judge